IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

G. W. BURLEY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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In the

United States Circuit Court of Appeals

For the Seventh Circuit

No. 8249

G. W. BURLEY, ET AL.,
Plaintiffs-Appellants,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,
Defendant-Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

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1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable John P. Barnes, District Judge of the United States for the Northern District of Illinois on Twentieth day of February, in the year of our Lord one thousand nine hundred and Forty-One, being one of the days of the regular February Term of said Court, begun Monday, the Third day of February, and of our Independence the 165th year. Placita.

Present:

Honorable John P. Barnes, District Judge.
William H. McDonnell, U. S. Marshal.
Hoyt King, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

Harry M. Alderman, F. E. Beccue, W. R. Bramer, G. W. Burley, J. E. Challender, Christine L. S., Paul Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, M. Kusner, P. F. McNamara, R. L. Miller, T. J. Murray, J. C. Newman, Edward R. Nolan, G. T. Priest, B. F. Smith, W. G. Smith, M. F. Starkweather, L. Strodtbeck, Ernest Thompson, Malcolm L. Young, H. A. Schroeder,

vs.

Elgin, Joliet and Eastern Railway Company, an Illinois Corporation.

No. 2341.

Be It Remembered, that the above-entitled action was commenced by the filing of the following Complaint in the above-entitled cause, in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the Nineteenth day of November, A. D. 1940.

3 IN THE DISTRICT COURT OF THE UNITED STATES, Filed Nov. 19, 1940.

Northern District of Illinois,

Eastern Division.

Harry M. Alderman, F. E. Beccue, W. R. Bramer, G. W. Burley, J. E. Challender, Christine L. S., Paul Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, M. Kusner, P. F. McNamara, R. L. Miller, T. J. Murray, J. C. Newman, Edward R. Nolan, G. T. Priest, B. F. Smith, W. G. Smith, M. F. Starkweather, L. Strodtbeck, Ernest Thompson, Malcolm L. Young, H. A. Schroeder,
Plaintiffs,

vs.

Elgin, Joliet and Eastern Railway Company, an Illinois Corporation,
Defendant.

Civil Action No. 2341.
Jury Requested.

COMPLAINT.

To the Honorable Judge of the District Court of the United States, in and for the Northern District of Illinois, Eastern Division:

Plaintiffs allege:

1. That more than one half of the plaintiffs herein are citizens of the State of Indiana and the defendant herein is a corporation incorporated under the laws of the State of Illinois. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

2. That on or about July 27, A. D. 1934 and subsequent thereto, they entered the employment of the defendant, under a written contract of employment, the original of which will be produced at the trial hereof, which had previously been obtained by the Brotherhood of Railroad
4 Trainmen under date of April 1, 1927. Said contract among other things contains Article 6 which is in words and figures as follows:

"(A) Regularly assigned yard crews will each have a fixed starting time and the starting time of a crew will not be changed without at least forty-eight (48) hours advance notice. Present practice as to the handling of transfer crews is not affected by the foregoing.

No yardman will be required to work more than one (1) assigned period in any twenty-four (24) consecutive hours.

(B) Yard crews shall have a designated point for going on duty, and a designated point for going off duty.

Starting time of yard crews on one, two or three 8-hour shifts will be as follows:

7 a. m., 8 a. m. and 8:30 a. m.

3 p. m. and 4 p. m.

11 p. m., 12 midnight, and 12:30 a. m.

except in hot metal and cinder, coke oven, Buffington and Waukegan districts, in one, two or three shifts, starting time will be 6:30 a. m., 7 a. m., 7:30 a. m., and 8 a. m.; 2:30 p. m., 3 p. m., 3:30 p. m., and 4 p. m.; and 10:30 p. m., 11 p. m., 11:30 p. m., and 12 o'clock midnight.

Starting time for Stockton engines will be 6:30 a. m., 1:30 p. m. and 8:30 p. m.

Starting time for yard crews handling ore at South Chicago will be 6 a. m. and 1 p. m.

Starting time for yard crews handling coal and ore at Gary will be 6 a. m. and 1 p. m.

Starting time for yard crews assigned to coal loading and unloading at East Joliet will be 6:30 a. m.

Whenever two standards of time are established, starting time may be changed one hour from period above provided."

3) That therein and thereby the defendant agreed with plaintiffs herein to observe definite starting times for the crews of which plaintiffs were then members. That said plaintiffs on July 27, 1934, and continuously from that date to November 15, 1938, were members of the Brotherhood of Railroad Trainmen.

5 4) That the authorized officials of said plaintiffs, for and on their behalf verbally agreed to suspend the operation of said scheduled Article 6 of said agreement as aforesaid, for a period of thirty days only, to enable the industry to become adjusted to the new schedule; i. e. until August 26, 1934, at which date said article as to starting time was to go into effect. To which the plaintiffs, and the

defendant by and through its duly constituted officials agreed.

5) That contrary to said agreement and the contract of employment as aforesaid, said defendant on August 26, 1934, refused, and continuously to and including November 14, 1938 has refused to abide by the terms thereof.

6) That your plaintiffs and each of them have at all times been ready, willing and able to perform, and have performed their part of said agreement, insofar as they were able, and have at various and sundry times since August 26, 1934, made demand upon the defendant to perform the terms thereof, as required by said agreement aforesaid.

7) That the plaintiffs herein have duly performed the other terms of said contract in and about the settlement of the plaintiffs' controversy with the defendant; they did confer and lodge protests with the various officials of the defendant including the local officials, General Superintendent and the Vice President, as required by Article 25 of said agreement which is as follows:

"Any controversy arising as to the application of the rules herein agreed upon to the Schedule shall be taken up by the local committee and the local officials. In the event of failure on their part to agree upon a satisfactory basis of settlement, the General Committee may take up the question with the General Superintendent, and in the event of their failure to agree upon a satisfactory settlement, the Committee may appeal to the Vice President."

But that said plaintiffs have, to the date hereof, been unsuccessful in arriving at any settlement of their claims.

6 8) That under the terms of said agreement aforesaid, each of the plaintiffs herein are entitled to pay for an additional day, at time and one-half, at the regular daily rate from August 26, 1934, to and including November, 14, 1938, for each foreman and each helper, for each day they were required to work in yard service in the "Whiting Yard" of defendant, in accordance with the established practice among railroads and employees thereof, and as provided in said Article 6 of said agreement as aforesaid.

9) That by reason of the violation of said agreement as aforesaid by the defendant, the approximate following amounts with interest thereon at five percent (5%) per

annum from the date due until paid, are owed plaintiffs by defendant as follows:

Harry M. Alderman	$ 4,200.00
F. E. Beccue	6,000.00
W. R. Bramer	14,000.00
G. W. Burley	7,000.00
J. E. Challender	4,500.00
L. S. Christine	7,000.00
Paul Garvey	14,000.00
J. M. Harr	3,000.00
A. T. Hatfield	7,000.00
R. P. Jones	6,974.00
M. Kusner	7,000.00
P. F. McNamara	4,800.00
R. L. Miller	7,000.00
T. J. Murray	4,000.00
J. C. Newman	6,000.00
Edward R. Nolan	4,500.00
G. T. Priest	9,000.00
B. F. Smith	6,000.00
W. G. Smith	4,000.00
M. F. Starkweather	4,250.00
L. Strodtbeck	10,000.00
Ernest Thompson	7,000.00
Malcolm H. Young	3,000.00
H. A. Schroeder	6,000.00

Wherefore plaintiffs individually hereby demand judgment against the defendant for the above sums of money set opposite their respective names as aforesaid, with interest thereon from the due date thereof, until paid, and costs of this suit.

John H. Gately,
Attorney for Plaintiffs.

9 And on, to wit, the 19th day of November, 1940, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Security for Costs in words and figures following, to wit: Filed Nov. 19, 1940.

10 DISTRICT COURT OF THE UNITED STATES.
* * (Caption—2341) * *

It enter itself as security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this Court; and in default of payment by the Plaintiffs of any cost ordered or adjudged to be paid by Plaintiffs hereby agree and stipulate that execution may issue against our property for all costs not exceeding two hundred dollars taxed against Plaintiffs.

Dated this 15th day of November, A. D. 1940.

United States Fidelity and Guaranty Company, a Maryland Corporation,
By Edmond J. Moroney,
Attorney-in-Fact (Seal)

Acknowledged before me this ..... day of ....., 19.....

.....
Clerk.

Certificate as to Attorney-in-Fact hereto attached not copied.

(Endorsed) District Court of the United States * * (Caption—2341) * * Summons in Civil Action Returnable not later than 20 days after service. Filed Nov. 27, 1940 Hoyt King, Clerk John H. Gately, Attorney for Plaintiff.

Marshal's Return.

Served this writ, together with copy of the Complaint, on the within named Elgin, Joliet & Eastern Railway Company, an Illinois corporation, by delivering copies thereof to H. I. Allen, Attorney, an agent of said corporation, this

22nd day of November, A. D. 1940. The President of said corporation not found in my district.

William H. McDonnell,
United States Marshal,
By Wm. Raff,
Deputy.

Marshal's Fees		
1	Service	$2.00
1	Miles	.06
	Total.....	$2.06

Filed Nov. 27, 1940.

7 And on, to wit, the 27th day of November, 1940, there was filed in the Clerk's office of said Court a certain Summons with Return of U. S. Marshal endorsed thereon in words and figures following, to wit:

8 DISTRICT COURT OF THE UNITED STATES.

* * (Caption—2341) * *

SUMMONS.

To the above named Defendant:

You are hereby summoned and required to serve upon John H. Gately, plaintiff's attorney, whose address 134 South LaSalle St., Chicago, Illinois, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Hoyt King,
Clerk of Court.
By Ann G. Joyce,
Deputy Clerk.

(Seal)

Date: November 19, 1940.

(Endorsed) District Court of the United States * * (Caption—2341) * * Security for Costs Filed Nov 19 1940 at 1 o'clock P. M. Hoyt King, Clerk John H. Gately, Atty.

11 And on, to wit, the 10th day of December, 1940, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion to Dismiss in words and figures following, to wit: Filed Dec. 10, 1940.

12 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—2341) * *

MOTION TO DISMISS.

Elgin, Joliet and Eastern Railway Company, defendant in the foregoing entitled case, by Harry I. Allen and Paul R. Conaghan, its attorneys, hereby moves that the complaint herein be dismissed for the reasons that (a) this Court lacks jurisdiction over the subject matter and (b) the plaintiffs have failed to state a claim upon which relief can be granted.

As a basis for this motion the defendant states:

1. The plaintiffs, on July 27, 1934, and since that date continuously until the date hereof, were members of the Brotherhood of Railroad Trainmen, a labor organization. On October 31, 1938, the Brotherhood of Railroad Trainmen entered into a written compromise agreement with the defendant relating in part to the dispute regarding the starting time during the period beginning July 27, 1934, and continuing until the date of said compromise agreement, for yardmen, including the plaintiffs, in the Standard Oil Company switching yard at Whiting, Indiana (referred to in the complaint as the "Whiting Yard"); that said agreement provided, inter alia, that
13 the settlement's set forth therein should be "a complete settlement" of all claims relating to the starting time of yardmen, including the plaintiffs, in the Standard Oil Company switching yard at Whiting, Indiana, and also, that "no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement."

2. The Brotherhood of Railroad Trainmen was selected by the plaintiffs as their representative to present to the officials of the defendant and to compromise the claims of the plaintiffs resulting from the interpretation or application of Article 6 of the agreement of the defendant with its yardmen concerning rates of pay, rules

and working conditions as applicable to yardmen employed in the Standard Oil Company switching yard at Whiting, Indiana. By the provisions of the said compromise agreement executed on October 31, 1938, the Brotherhood of Railroad Trainmen released all claims of the plaintiffs against the defendant arising out of the alleged violation of Article 6 of the agreement of the defendant with its yardmen.

3. The Brotherhood of Railroad Trainmen was selected by the plaintiffs as their representative to present to the National Railroad Adjustment Board the claims of the plaintiffs resulting from the interpretation or application of Article 6 of the agreement of the defendant with its yardmen concerning rates of pay, rules and working conditions as applicable to yardmen employed in the Standard Oil Company switching yard at Whiting, Indiana. The dispute was referred by the Brotherhood of Railroad Trainmen, as the representative of the plaintiffs, and by the defendant to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data relating to the dispute. On September 6, 1940, the National Railroad Adjustment Board, by order of the First Division, found that it had "jurisdiction over the dispute involved herein. The parties to said dis-
14 pute were given due notice of hearing thereon. The evidence shows that the parties to the agreement disposed of the claim here made by the letter of carrier dated October 28, 1938, accepted by employees October 31, 1938" and, in accordance with the provisions of the Railway Labor Act, entered an award "Claim denied per Findings." In accordance with the provisions of the Railway Labor Act, the said award is final and binding upon both parties to the dispute.

And in support of this motion and of the facts stated herein as basis for this motion, there is attached hereto the affidavit of T. E. Bond, Vice President of the defendant.

Harry I. Allen,
Paul R. Conaghan,
Attorneys for Elgin, Joliet and Eastern Railway Company, a corporation,
208 South LaSalle Street,
Chicago, Illinois.

15 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

Harry M. Alderman, F. E. Beccue, W. R. Bramer, G. W. Burley, J. E. Challender, Christine L. S., Paul Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, M. Kusner, P. F. McNamara, R. L. Miller, T. J. Murray, J. C. Newman, Edward R. Nolan, G. T. Priest, B. F. Smith, W. G. Smith, M. F. Starkweather, L. Strodtbeck, Ernest Thompson, Malcolm L. Young, H. A. Schroeder, *Plaintiffs,* *vs.* Elgin, Joliet and Eastern Railway Company, an Illinois corporation, *Defendant.*	Civil Action. No. 2341.

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS.

State of Illinois, } ss.
County of Cook. }

T. E. Bond, being first duly sworn, on oath deposes and says that he is Vice President of Elgin, Joliet and Eastern Railway Company, a corporation, defendant herein; that he makes this affidavit for the purpose of supporting the motion hereto annexed to dismiss the complaint filed herein; that Exhibit "A" hereto attached is a photostatic copy of the complaint filed by the Brotherhood of Railroad Trainmen against the defendant before the National Railroad Adjustment Board on November 23, 1936, relating to the alleged violation of Article 6 of the agreement between the defendant and its yardmen, working daily since July 27, 1934, in the Standard Oil Company switching yard at Whiting, Indiana; that Exhibit "B" attached hereto is a photostatic copy of the letter of the Adjustment Board, dated November 23, 1936, assigning Docket

No. 3537 to the complaint relating to the starting
16 time of yardmen in the Standard Oil Company switching yard at Whiting, Indiana; that Exhibit "C" attached hereto is a photostatic copy of a letter of the President of the defendant, addressed to the General Chairman of the Brotherhood of Railroad Trainmen, dated October 28, 1938, and referring to a compromise settlement of cases and grievances relating to the interpretation or application of agreements of the defendant with its employees concerning rates of pay, rules and working conditions, including Case No. 5 (Docket 3537) then pending before the Adjustment Board; that said offers of settlement set forth in the letter dated October 28, 1938, were accepted in writing by the General Chairman and Secretary of the Brotherhood of Railroad Trainmen on October 31, 1938, as set forth on page 8 of said compromise settlement; that Exhibit "D" attached hereto is a photostatic copy of a joint letter of the defendant and the General Chairman of the Brotherhood of Railroad Trainmen to the Adjustment Board, dated October 31, 1938, advising the Board of the settlement of cases, including Docket 3537, the complaint of the employees relating to starting time of yardmen in the Standard Oil Company switching yard at Whiting, Indiana; that Exhibit "E" attached hereto is a photostatic copy of a letter from the Board to the President of the defendant, dated October 31, 1938, removing case No. 3537 from the docket of the Adjustment Board; that Exhibit "F" attached hereto is a copy of the award in Docket No. 7324 of the National Railroad Adjustment Board First Division, dated September 6, 1940, relating to a second complaint regarding the starting time of yardmen in the Standard Oil Company switching yard at Whiting, Indiana, which second complaint was filed with the Board by the Brotherhood of Railroad Trainmen on May 18, 1939.

T. E. Bond.

Subscribed and Sworn to before me this 11th day of December, 1940.

Daniel J. O'Connell,
(Seal) *Notary Public.*

17 **EXHIBIT "A".**

BEFORE NATIONAL RAILROAD ADJUSTMENT BOARD

Division Number One

Brotherhood of Railroad Trainmen, versus
Elgin, Joliet & Eastern Railway Company.
Case No. 5.

Statement of Claim:

Complaint of the Brotherhood of Railroad Trainmen against the Elgin, Joliet & Eastern Railway Company, who contracted the work in industrial switching for the Standard Oil Company in their Whiting, Indiana, Plant and placed the employees under the agreement of the yardmen of the Elgin, Joliet & Eastern Railway Company, but failed to put into effect the starting time of yard crews as provided for in the agreement due to making arrangements with the Engineer's Committees that they would be privileged to start the crews at the time that such crews were started while the switching was being done by the Standard Oil Company crews.

The contention of the Elgin, Joliet & Eastern Railway Company being that the Standard Oil Company cannot be serviced without having the engines starting in yard service at such times as the former custom.

The contention of the Committee for the Brotherhood of Railroad Trainmen being that larger and greater concerns with more complicated service are being and have been handled for a great many years with the continuity of service as outlined in the agreement with three shifted engines in yard service. We do not understand that it is the carrier's right to establish an irregular starting time in the Whiting Yard in violation of the agreement between them and the yardmen because of the fact that the Engineers are willing that such be done.

We respectfully request oral argument on Paragraph (B) of Article 6, reading in part as follows:

"Yard crews shall have a designated point for going on duty, and a designated point for going off duty. Starting time of yard crews one, two or three 8 hour shifts will be as follows: 7:00 A. M. 8:00 A. M. 8:30 A. M. 3:00

P. M. and 4:00 P. M. 11:30 P. M. 12:00 midnight, and 12:30 A. M." No exceptions for engines in this class of service.

Yours truly,
C. H. Williams,
General Chairman-BRT-EJ&E System.

18 EXHIBIT "B".

(Letterhead of National Railroad Adjustment Board.)

November 23, 1936.

Mr. S. M. Rogers, President
Elgin, Joliet & Eastern Railway Company
Chicago, Illinois

Mr. A. F. Whitney, President
Brotherhood of Railroad Trainmen
Cleveland, Ohio

Gentlemen:

Our Docket Numbers 3533 to 3543, inclusive, have been assigned as indicated to the following Elgin, Joliet & Eastern Railway Company—Trainmen's cases, which were submitted ex-parte at the instance of General Chairman Williams, representing the Brotherhood of Railroad Trainmen on that railroad:

3533—"Complaint against the Elgin, Joliet & Eastern Railway Company for failure to comply with their agreement with train and yardmen, using the Carnegie-Illinois Steel Corporation's ownership or operation of certain Plants as a subterfuge."

3534—"Complaint against the Elgin, Joliet & Eastern Railway Company for permitting their Yardmasters and Assistant Yardmasters to perform service as yardmen in their yards depriving yardmen of work covered in Article 3 of the agreement."

3535—"Violation of the Agreement in starting yard crews as transfers, who do yard switching, in violation of the established starting time."

3536—"Protest against contracting the hauling of cinders out of the South Chicago Yard and permitting the Pullman Railroad to enter that yard and take cars out of that yard in violation of Article 3 of the Agreement."

3537—"Protest against starting yard engines in the

Whiting, Indiana yard, (Standard Oil Company Plant) in violation of Article 6 of the agreement."

19 3538—"Protest against the use of self propelled cranes owned by the Carnegie-Illinois Steel Corporation to weigh cars in the South Chicago Yard in violation of the agreement."

3539—"Time claim of Yardman W. E. Bertholf, South Chicago Yard for being deprived of work account the Elgin, Joliet & Eastern Railway Company permitting the work to be done by self propelled cranes."

3540—"Time claim of T. Schweir, South Chicago Yard, for being deprived of work account the Elgin, Joliet & Eastern Railway Company permitting work to be done by self-propelled cranes."

3541—"Time claim of H. Linne, South Chicago Yard, for being deprived of work account the Elgin, Joliet & Eastern Railway Company permitting the work to be done by self-propelled cranes."

3542—"Claim of W. O. Wilton for payment of time lost, account dismissed from the service for alleged violation of Rule "G" without a proper investigation under the provisions of Article 18 of the Agreement."

3543—"Claim of Brakeman J. H. Kimberlin, Gary Division, for pay for all time lost when unjustly dismissed from the service for responsibility in a head end collision between Train No. 6 and Extra 702, East, at Hartsdale, Indiana, January 11, 1936."

These cases are assumed to be complete and nothing will be added to them prior to the date of the hearing thereof; however, at the direction of the Board we are sending to the Management copies of the Employees' submissions, and to the General Chairman, with copy of this letter, copies of the Management's submissions.

This is being done in order that both the Management and the Committee may have an opportunity to study the submissions prior to the date set for hearings, information as to which will be given to you later.

It should be understood, however, that any argument presented to the Board at the hearing should be confined to matters incorporated in the submissions.

Yours very truly,

T. S. McFarland,
Secretary.

TSM:WB
Enc.
cc: Mr. C. H. Williams

EXHIBIT "C".

(Letterhead of Elgin, Joliet and Eastern Railway Co.)

October 28th, 1938.

Mr. C. H. Williams,
Gen. Chairman, Brotherhood of Railroad Trainmen,
603 Jackson Street,
Joliet, Illinois.

Dear Sir:

Since my letter of August 18th in which I tentatively proposed settlement of certain matters of grievance we have had further correspondence and conferences which have modified our decision in some cases. Therefore, in order that the whole matter be placed in concrete form I am outlining below our proposals to settle all of the cases except as otherwise specified.

Case No. 1—Labor Board Docket #3533—Handling of railroad cars by cranes or other forms of power.

Settled with respect to South Chicago and Joliet by agreements. Said agreements provide that the use of cranes in the handling of railroad equipment is restricted to certain movements set forth specifically in said agreements, coupled with the proviso that all work not so specifically allocated to cranes (or other forms of power) is considered yard work as defined in Article 3 of the Yardmen's Agreement, and will be handled as provided for in said agreement. It is further understood and agreed that in the event similar situations obtain in other yards where tracks are owned by the Elgin, Joliet and Eastern Railway Company that efforts will be made to arrive at a mutually satisfactory agreement respecting the movement in such yards.

Case No. 2—Labor Board Docket #3534—Work of Yardmasters and Assistant Yardmasters.

Settled by the issuance of instructions to the effect that Yardmasters at South Chicago, Joliet Mill Yard, Whiting, (S. O. Yard), Kirk Yard and Mill Yard at Gary, and Waukegan Yard will cease and desist performing work of Yardmen in compliance with Order No. 22839 of the Illinois Commerce Commission dated January 1st, 1935.

Case No. 3—Labor Board Docket #3535—Starting time of transfer engines.

It is agreed that for the future transfer engines starting

at times other than those specified in Article 6 Yardmen's Agreement will not be used in general yard work.

21 Case No. 4—Labor Board Docket #3536—Delivery of cars to Pullman Railroad in South Chicago Yard.

It is understood and agreed that this case now pending before the Labor Board will be left with that body for adjudication.

Case No. 5—Labor Board Docket #3537—Starting time of switch engines in Whiting S. O. Yard.

Settled by agreement that the starting times for a ninety day trial period commencing November 15th, 1938, shall be the times provided for in Article 6 of the Yardmen's Agreement instead of the starting times heretofore agreed upon and now being followed. If at the end of the ninety day trial period the Railway Company or its employees claim that the starting times as fixed in Article 6 do not result in efficient and economical operation and in satisfaction to our employees and to the industry served, then representatives of the Railway Company and representatives of the Yardmen, and representatives of the Engineers and representatives of the Firemen will sit down and work out a schedule of starting time best suited for meeting the special requirements of the industry.

Case No. 6—Labor Board Docket #3538—Weighing of pig iron with cranes in South Chicago Yard.

Settled by agreement between Elgin, Joliet and Eastern Railway Co., and its Yardmen restricting movement of railroad cars by cranes in this yard.

Case No. 7—Labor Board Docket #3723—Handling of water car by cranes in South Chicago Yard.

Settled by specific proviso in agreement covering the movement of cars by cranes in this yard.

Case No. 8—Labor Board Docket #3539—Time claim.

Settled by agreement to pay Mr. W. E. Bertholf Eight Dollars and Three Cents ($8.03).

Case No. 9—Labor Board Docket #3540—Time claim.

Settled by agreement to pay Mr. T. Schweir Eight Dollars and Three Cents ($8.03).

Case No. 9-A—Not before Labor Board. Furnishing electric lanterns to Indiana employees.

The Company to furnish electric lanterns to Indiana train and yardmen on same terms as now furnished

22 train and yardmen in Illinois. Mr. Williams to withdraw his request that bulbs and batteries for said lanterns be placed on cabooses in both Illinois and Indiana.

Case No. 10—Labor Board Docket #3541—Time claim.
Settled by agreement to pay to Mr. H. Linne Eight Dollars and Three Cents ($8.03).

Case No. 11—Labor Board Docket #3542—Time claim.
Settled by agreement to pay Mr. W. O. Wilton Three Hundred Twenty-nine Dollars and Seventy-three Cents ($329.73).

Case No. 13—Labor Board Docket #3510—Time Claim account change in starting time of engine at Whiting (S. O. Yard).
Settled by agreement to pay—
Mr. F. A. Emerson, Eight Dollars and Three Cents ($8.03);
Mr. M. Barsich, Seven Dollars and Forty-five Cents ($7.45);
Mr. S. H. Shearer, Seven Dollars and Forty-five Cents ($7.45).

Case No. 14—Labor Board Docket #3509—Time claim account alleged run around.
Settled on basis presented but without establishing any precedent, the following amounts will be paid.
Mr. J. W. Hoover, Six Dollars and Two Cents ($6.02);
Mr. H. Bogart, Five Dollars and Two Cents ($5.02);
Mr. C. Mackin, Five Dollars and Two Cents ($5.02).

Case No. 15—Labor Board Docket #3508—Time claim for handling switches at Dyer.
Settled by agreement to pay Mr. P. E. Miles Seven Dollars and Thirty-three Cents ($7.33).

Case No. 16—Labor Board Docket #3511—Handling of empty cars from Kirk Yard by Gary Mill Yard crew.
Settled by agreeing to pay—
Mr. L. E. Clement, Eight Dollars and Three Cents ($8.03);
Mr. P. Carr, Seven Dollars and Forty-five Cents ($7.45);
Mr. W. Brown, Seven Dollars and Forty-five Cents ($7.45).
It is further agreed that Gary Mill Yard engines will not be permitted to go into Kirk Yard for the purpose of taking back loaded cars or empty cars for loading.

Case No. 17—Labor Board Docket #3543—Time claim account discipline imposed as result of an accident.
Settled by agreement to pay Mr. John Kimberlin, Nine Hundred Fifty-one Dollars and Thirty Cents ($951.30).

23 Case No. 20—Revision of grade in Yard "A", East Joliet.

Settled by agreement to change grade of tracks in Yard "A", East Joliet, at such times when it is necessary to do other work on these tracks.

Case No. 21—Handling of cars by cranes at East Joliet.

Settled by agreement specifically providing the movements which may be made by cranes in this yard.

Case No. 23—Time claim account brakeman held in to act as conductor.

Settled by agreement to pay Mr. L. C. Talley the amount of claim filed—Six Dollars and Thirty Cents ($6.30)—and further agreed that in such future cases the man so held in will be paid not less than the amount he would have received on his regular assignment.

Case No. 24—Handling of locomotives between roundhouse and wye at East Joliet.

Settled by agreement to pay time claims as listed below, and subscribing to the understanding that in future cases of this kind when two locomotives are moved at a time one yardman, who will receive foreman's pay, will be used. If more than two locomotives are so handled a full crew will be used.

Mr. E. R. Smith, Eight Dollars and Three Cents ($8.03);

Mr. M. Brogan, Four Dollars and Sixty-eight Cents ($4.68);

Mr. D. H. Allen, Eight Dollars and Three Cents ($8.03);

Mr. G. Stickel, Four Dollars and Ten Cents ($4.10);

Mr. J. E. McNamara, Four Dollars and Ten Cents ($4.10);

Mr. F. Kremek, Fifty-eight Cents (58¢);

Mr. C. Osman, Twenty-two Dollars and Thirty-four Cents ($22.34);

Mr. F. Jones, Seven Dollars and Forty-five Cents ($7.45);

Mr. W. Limebeck, Fourteen Dollars and Ninety Cents ($14.90);

Mr. W. A. Swinke, Seven Dollars and Forty-five Cents ($7.45);

Mr. C. Allen, Fourteen Dollars and Ninety Cents ($14.90);

Mr. R. Rish, Fourteen Dollars and Ninety Cents ($14.90);

Mr. G. Meifert, Fourteen Dollars and Ninety Cents ($14.90);

Mr. G. Talley, Seven Dollars and Forty-five Cents ($7.45);

Mr. E. Nealis, Seven Dollars and Forty-five Cents ($7.45);
Mr. C. J. Pike, Twenty-nine Dollars and Seventy-nine Cents ($29.79);
Mr. D. W. Reed, Seven Dollars and Forty-five Cents ($7.45);
Mr. J. L. Elens, Fourteen Dollars and Ninety Cents ($14.90);
Mr. C. Z. Cooper, Seven Dollars and Forty-five Cents ($7.45);
Mr. A. Hedlund, Fourteen Dollars and Ninety Cents ($14.90);
Mr. J. J. Shroba, Twenty-two Dollars and Thirty-four Cents ($22.34);
Mr. J. Dutka, Seven Dollars and Forty-five Cents ($7.45);
Mr. V. A. Newell, Fourteen Dollars and Ninety Cents ($14.90);
Mr. L. Simon, Seven Dollars and Forty-five Cents ($7.45);
Mr. R. Cheney, Twenty-two Dollars and Thirty-four Cents ($22.34);
Mr. R. Pike, Twenty-two Dollars and Thirty-four Cents ($22.34);
Mr. W. J. Carlson, Seven Dollars and Forty-five Cents ($7.45);
Mr. C. F. Stoner, Seven Dollars and Forty-five Cents ($7.45);
Mr. P. H. Kane, Fourteen Dollars and Ninety Cents ($14.90).

Case No. 36—Handling engines between Roundhouse and Machine Shop at East Joliet.

Settled by agreement to pay—
Mr. F. R. Wagner, Eight Dollars and Three Cents ($8.03);
Mr. R. Pike, Seven Dollars and Forty-five Cents ($7.45);
Mr. L. Kuhazda, Seven Dollars and Forty-five Cents ($7.45).

Case No. 38—Time claim account yardman working one shift as Assistant Yardmaster and another shift as Yardman during one twenty-four hour period.

Settled by agreeing to pay Mr. H. A. Edwards, Eight Dollars and Fifty-three Cents ($8.53), and with the understanding that, when men are available, yardmen will not be permitted to work more than one shift in any twenty-four hours, and with the further understanding that this means

that a yardman may not work one shift as yardman and another shift as an Assistant Yardmaster (or Yardmaster) in the same twenty-four hours.

Case No. 39—Time claim.

Settlement by agreement to pay—

Mr. A. Holem, Eight Dollars and Fifty-three Cents ($8.53);

Mr. J. B. Massey, Seven Dollars and Ninety-four Cents ($7.94);

Mr. G. A. Hamil, Seven Dollars and Ninety-four Cents ($7.94).

Case No. 40—Time claim.

Settled by agreement to pay—

Mr. F. Rusinski, Eight Dollars and Fifty-three Cents ($8.53);

Mr. G. A. Sidebottom, Seven Dollars and Ninety-four Cents ($7.94);

Mr. H. O'Neil, Seven Dollars and Ninety-four Cents ($7.94).

Case No. 41—Time claim.

Settled by agreement to pay—

Mr. C. S. Wells, Eight Dollars and Fifty-three Cents ($8.53);

Mr. J. V. Golden, Seven Dollars and Ninety-four Cents ($7.94);

Mr. J. E. Clavin, Seven Dollars and Ninety-four Cents ($7.94).

25 Case No. 42—Time claim account failure to notify brakeman of return of conductor to his assignment.

This case involves the failure to notify Brakeman P. E. Miles of the return of regular Conductor for whom Mr. Miles had been substituting at his assignment. Failure to notify Mr. Miles was due to inability to reach him account station employees not having his address. However, without establishing any precedent, case is settled by agreement to pay Mr. Miles Nine Dollars and Seventy-one Cents ($9.71).

Case No. 43—Handling of cars by cranes in Whiting (S. O. Yard). Time claim of Mr. H. M. Alderman, Mr. J. M. Harr and Mr. F. A. Douglas.

Inasmuch as we have no control over the situation we cannot allow these claims.

Case No. 44—Time claim.

This claim involves the displacement of Yard Foreman Hyde on a west side engine at Gary when force was reduced.

Claim predicated on the fact that a certain Assistant Yardmaster was retained in that capacity while an older yardman who had been serving as Assistant Yardmaster was reduced. Disposed of by agreeing to pay Mr. L. A. Hyde Twelve Dollars and Eighty-seven Cents ($12.87), representing the difference between what he actually earned as helper and what he would have earned as foreman of engine.

Instructions have been issued which will eliminate the practice complained of, which is the basis for this claim.

Case No. 45—Time claim of Yardmen J. Harr and F. A. Douglas, account cranes handling cars in Whiting (S. O. Yard).

Inasmuch as we have no control over the situation we cannot allow these claims.

Cases Nos. 46, 47 and 48—All Personal Injury Claims.

These cases have been closed as per your letter of August 27th, 1938.

Case No. 50—Time claim of Yardmen H. Alderman, F. A. Douglas and T. J. Murray, account cranes handling cars in Whiting (S. O. Yard).

Inasmuch as we have no control over the situation we cannot allow these claims.

Cases Nos. 52 and 53—Handling of cars by dinkey engines in Whiting (S. O. Yard).

We have not been presented with specific time claims covering these cases but understand they are similar to the claims filed under cases Nos. 43, 45 and 50. If so, the same conditions obtain and we would be unable to allow such claims if they were presented.

26 Case No. 54—Personal injury claim.

This case has been closed as per your letter of August 27th, 1938.

In addition to the above cases which have been discussed at my office, we will also settle the following time claims for which no case numbers have been assigned. These claims all involve the handling of cars by cranes in the South Chicago Yard.

Case No. 54-A—Time claim August 12, 1937.

C. F. Fox—Eight Dollars and Three Cents ($8.03);

F. X. Lingerman—Seven Dollars and Forty-five Cents ($7.45);

J. B. Murphy—Seven Dollars and Forty-five Cents ($7.45).

Case No. 54-B—Time claim September 3, 1937.

W. A. Ahrendt—Eight Dollars and Three Cents ($8.03);

C. L. Keilman—Seven Dollars and Forty-five Cents ($7.45);
L. A. Floyd—Seven Dollars and Forty-five Cents ($7.45).
Case No. 54-C—Time claim May 24, 1938.
R. Letcher—Eight Dollars and Fifty-three Cents ($8.53);
C. Ruby—Seven Dollars and Ninety-four Cents ($7.94);
J. Lynn—Seven Dollars and Ninety-four Cents ($7.94).
Case No. 54-D—Time Claim May 26, 1938.
T. P. McNulty—Eight Dollars and Fifty-three Cents ($8.53);
J. Misanin—Seven Dollars and Ninety-four Cents ($7.94);
J. Cross—Seven Dollars and Ninety-four Cents ($7.94).

We have by this letter given you a complete resume of all of the claims which have not heretofore been disposed of, filed by you on behalf of the employees whom you represent and have proposed in this letter a very liberal disposition of all the cases involved. The settlements proposed are predicated on a complete settlement and withdrawal of all cases now pending either before the board, or under discussion with this office except Case No. 4, which it is understood will be left to a decision by the National Railroad Adjustment Board, and it is further understood that in the event these settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and
27 that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement.

Yours truly,
S. M. Rogers,
President.

cc—Messrs. J. E. Reilly,
C. L. Wilson.
C. H. Ireland,
G. E. Chessman.

Accepted for the Yardmen: Oct. 31, 1938.
C. H. Williams,
General Chairman, B. of R. T.
S. F. Johnson,
Secretary, B. of R. T.

28 EXHIBIT "D."

(Letterhead of Elgin, Joliet and Eastern Railway Co.)

October 31st, 1938.

Mr. T. S. McFarland,
Secretary, First Division,
National Railroad Adjustment Board,
220 South State Street,
Chicago, Illinois.

Dear Sir:

The following cases have been settled and we, therefore, jointly request that they be withdrawn from the Docket of the Board:

National Railroad Adjustment Board Docket No. 3533.

Claim of employes that the EJ&E Railway Company is violating Article 3 of Yardmen's Agreement.

National Railroad Adjustment Board Docket No. 3534.

Claim of employes that Yardmasters and Assistant Yardmasters are performing work of Yardmen. * * *

National Railroad Adjustment Board Docket No. 3535.

Claim of employes that Yard Crews are starting as Transfer crews. * * *

National Railroad Adjustment Board Docket No. 3537.

Complaint of employes that yard engines in S. O. Company Plant are being started at times other than those provided in Article 6 of the Yardmen's Agreement.

National Railroad Adjustment Board Docket No. 3538.

Complaint against EJ&E Railway Company because C.I.S. Corporation self-propelled cranes are used in weighing cars. * * *

National Railroad Adjustment Board Docket No. 3723.

Complaint against EJ&E Railway Company for permitting use of self-propelled cranes to perform yard work. * * *

National Railroad Adjustment Board Docket No. 3539.

Claim of R. E. Berthoff * * * August 8th, 1935. * * *

29 National Railroad Adjustment Board Docket No. 3540.

Claim of E. Schweir * * * August 3rd, 1935. * * *

National Railroad Adjustment Board Docket No. 3541.

Claim of H. Linne * * * September 3rd, 1935. * * *

National Railroad Adjustment Board Docket No. 3542.

Claim of W. O. Wilton * * * between November 10th, 1935 and January 14th, 1935.

National Railroad Adjustment Board Docket No. 3510.

Claim of F. A. Emerson, M. Barsich and S. H. Shearer * * * November 1st, 1935. * * *

National Railroad Adjustment Board Docket No. 3509.

Claim of J. W. Hoover, H. Bogart and C. Mackin * * * January 7th, 1935. * * *

National Railroad Adjustment Board Docket No. 3508.

Claim P. E. Miles * * * November 26th, 27th, 29th, 30th, December 2nd, 4th 5th, 6th, 9th, 10th and 11th, 1935. * * *

National Railroad Adjustment Board Docket No. 3511.

Claim of L. E. Clement, P. Carr and W. Brown * * * August 15th, 1935.

National Railroad Adjustment Board Docket No. 3543.

Claim of John R. Kimberlin for time lost between January 16th, 1935 and his return to work in July, 1935.

Elgin, Joliet and Eastern Railway Company,

By S. M. Rogers,
President.

For the Employes:
C. H. Williams,
General Chairman, B. of R. T., EJ&E System.

EXHIBIT "E."

(Letterhead of National Railroad Adjustment Board.)

October 31, 1938.

Mr. S. M. Rogers, President,
Elgin, Joliet and Eastern Railway Company,
208 South La Salle Street,
Chicago, Illinois.

Mr. A. F. Whitney, President,
Brotherhood of Railroad Trainmen,
Cleveland, Ohio.

Gentlemen:

The parties to claims covered by the following Docket Numbers having requested their withdrawal, they are removed from our docket:

Docket No. 3533 ex parte submission
3534 " "
3535 " "
3537 " "
3538 " "
3723 " "
3539 " "
3540 " "
3541 " "
3542 " "
3510 " "
3509 joint submission
3508 " "
3511 " "
3543 ex parte submission

Yours very truly,

T. S. McFarland,
Secretary.

TSM-wcf
cc: Mr. C. H. Williams, Genl. Chmn. BofRT.

31 EXHIBIT "F."

Award No. 5048
Docket No. 7324

National Railroad Adjustment Board

First Division

The First Division consisted of the regular members and in addition Referee Paul W. Richards when award was rendered.

Parties to Dispute:

Brotherhood of Railroad Trainmen

Elgin, Joliet and Eastern Railway Company

Statement of Claim: Claim for one day's pay at time and one-half for each foreman and each helper for each day they were required to work in yard service in the Whiting (Standard Oil Company) Yard, in violation of the fixed starting time provided for in Article No. 6 of the Yardmen's Agreement of the Elgin, Joliet and Eastern Railway Company, effective January 1, 1927, and appli-

cable to Whiting (Standard Oil Company) Yardmen, July 27, 1934, from dates of August 27, 1934, until November 14, 1938, inclusive.

Note: Claim made thirty (30) days after agreement was made effective on account of committees agreeing to permit this length of time for yardmen to become accustomed to the changes being made.

Employes' Statement of Facts: The inter-plant switching of the Standard Oil Company at Whiting, Indiana, was turned over to the Elgin, Joliet & Eastern Railway Company on date of July 27, 1934. The Yardmen employed by them were taken off of their payrolls and employed by the E. J. & E. Railway Company and service accepted under the Yardmen's Agreement covering E. J. & E. Yardmen. That agreement provides for a fixed starting time for yard crews in Article No. 6. The starting time provided for was not observed in the Whiting yard until November 15, 1938, at which time the Management agreed with the Brotherhood of Railroad Trainmen to place Whiting yard crews on fixed starting time. The Management always contended that the committees for the organizations agreed with them that the starting time provided for in the Yardmen's Agreement did not need be applied in the Whiting yard. The committees contend that they consented to permitting them to keep the starting times in effect while the work was being done by the Standard Oil Company for a period of thirty days in order that the yardmen might become accustomed to the change.

Position of Committee: This claim is made for payment of time by the Yardmen of Whiting Yard and is supported by Article No. 6 of the Yardmen's Agreement. It is not for this Committee to decide on the veracity of the claims made by either the carrier or the committee negotiating taking over the switching at Whiting. It is the judgment of this Committee that the matter of starting time was of equal importance in arranging the agreement at Whiting as it was when made to cover the yardmen on the E. J. & E. proper. A statement that certain agreements were reached does not support the carriers contention. Even if such agreements were reached it would not be possible to invalidate the prescribed written rule of Article 6. It could be claimed by the carrier that the committees had agreed that the Schedule did not apply to the Whiting Yard, but surely if it or any rule therein was to be understood to not

apply, they should have been confined to writing in order that future committees would understand them.

If the Management and the Committees failed to so negotiate, this Committee cannot give consideration to the claim that it was so negotiated. The part of Article 6 of the Yardmen's Agreement is applicable to the case and supports the claim.

"Article 6, 'A'—'B.'
(in part)

"(A) Regular assigned yard crews will each have a fixed starting time and the starting time of a crew will not be changed without at least forty-eight (48) hours advance notice. Present practice as to handling of transfer crews is not affected by the foregoing. No yardman will be required to work more than one (1) assigned period in any twenty-four (24) consecutive hours.

"(B) Yard crews shall have a designated point for going on duty, and a designated point for going off duty. Starting time of yard crews on one, two or three 8-hour shifts will be as follows:

Underlining of the words, 'will be,' is mine.

"7:00 A. M., 8:00 A. M. and 8:30 A. M.
3:00 P. M. and 4:00 P. M.
11:00 P. M. and 12:00 M. and 12:30 A. M."

A request was made by this Committee to Mr. T. D. Beven, General Manager for a complete list of crews in the Whiting Yard started at times other than the fixed starting time provided for in Article No. 6. Reply is herewith quoted:

"Joliet, Illinois
March 6, 1939.

Mr. C. H. Williams,
Gen. Chairman, B. of R. T.,
603 Jackson Street, Joliet, Illinois.

Dear Sir:

It will not be consistent to furnish information showing starting time of all yard crews from July 27, 1934 to and including November 14, 1938, as requested in yours of March 1st.

I am at a loss to understand the reason for this request as any claim affecting starting time in the Standard Oil

Company yard at Whiting prior to November 15, 1938 was disposed of by an agreement made between you and Mr. Rogers as covered in letter to you dated October 28, 1938.

Yours truly,
(Signed) T. D. Beven,
General Manager."

In order that all matters be made clear in this case, reference is made by excerpts from letters to the Management by the Committee during the process of negotiation and the agreement reached on date of October 28, 1938, whereby Labor Board Docket No. 3537 was withdrawn from the Board. There were no agreements reached whereby payment for violation of Article No. 6 of the Yardmen's Agreement would be waived as a result of withdrawal of Labor Board Docket No. 3537. In fact that case held no claim
32 for payment for time. It was simply a case to settle the dispute as to the carrier's right to force the yard crews in the Whiting yard to work at times other than the fixed starting time provided for in Article 6. Certainly there are no words in the agreement reached which implies in any manner that the committee waived the right to claim for payment for violations prior to withdrawal of the case from the Board. It should be clear that by placing the correct starting time into effect that thereafter there were no violations and the clearness in which the provision is written shows that all that was agreed to was, that after a 90 day trial the committees would meet and confer as to whether fixed starting time was feasible. This was done on date of February 27, 1939, and no reason was shown why a change should be made. The decision in the case is as follows:

"Case No. 5—Labor Board Docket No. 3537—Starting time of switch engines in Whiting S. O. Yard.

Settled by agreement that the starting times, for a ninety day trial period commencing November 15th, 1938, shall be the times provided for in Article 6 of the Yardmen's Agreement instead of the starting times heretofore agreed upon and now being followed. If at the end of the ninety day trial period the Railway Company or its employes claim that the starting times as fixed in Article 6 do not result in efficient and economical operation and in satisfaction to our employes and to the industry served, then representatives of the Railway Company and representatives of the Yardmen, and representatives of the Engineers and

representatives of the Firemen will sit down and work out a schedule of starting time best suited for meeting the special requirements of the industry."

Reference is made to my letter addressed to Mr. Rogers on date of August 22, 1938, specifically showing the conclusions reached by them on proposals for settlement of the cases pending. Each case referred to separately. Docket 3537 is referred to in the last paragraph of page two and reads as follows:

"3537—It is noted that despite our offer to place the starting times of Whiting yard crews on a trial for a period of 90 days on their regular starting time, you desire to cut that to 30 days. You refer to a verbal understanding in an agreement between the committees, including my predecessor, that the present starting time would prevail. I am not bound to any verbal agreements of my predecessor had he made one, nor will my successor be bound by one made by me if I make one. However, I will not make one, nor will I consider the one you contend was was made to cover starting time in the Whiting Yard. The record shows, and Mr. Meade confirms that it was agreed to accept the conditions as they were for a period of thirty days. You declined to even change it and in the absence of a written agreement my committee contends for regular starting time. We do not think a true picture can appear in less than a 90 day trial."

Note: The above should have read that the letter referred to was of August 22, 1938.

Reference is also made to my letter of July 30, 1938 at page three, which also refers to Case 3537. I quote first paragraph.

"It has been contended that it was impossible to operate in this plant on established starting time as provided for in the Yardmen's Agreement of the Elgin, Joliet & Eastern Railway Company. In order to dispose of this case, the engines working in this plant shall be started by the established starting time for a period of three months commencing with the 1st day of September and remain on schedule starting time for a period of three months until December 1st. If by that time there is established proof that injustice is being done, the joint committees of the B. of L. E., B. of L. F. & E. and the B. of R. T. will meet the officials for the purpose of regulation or adjustment."

As stated before, Case No. 5—Labor Board Docket No. 3537 contained no claim for pay to Whiting Yardmen.

Consequently it was not a question before the Management and the Committee in the starting time negotiation and, claim cannot be made that a waiver was made on a matter which was not negotiated. The claim that such was done cannot be supported by any record.

The fact of the matter is, the problem causing concern was the matter of the Carnegie-Illinois Steel Corporation using locomotive cranes to perform switching service within the South Chicago Yard was the factor in obtaining the settlement of cases in the agreement reached on October 28, 1938. Attached hereto is a copy of my letter of July 25, 1938, from the third paragraph to the end conclusively shows there had been lengthy periods of violation involving many thousands of dollars in penalty payment if a favorable award was made for the employes.

At the request of Mr. Bond, I had a lengthy interview on this matter at the time the arbitrary allowance to Roadmen was made in Chicago, however, since I object to verbal claims I shall not contend for what occurred in that case, but he will undoubtedly recall it concerned the South Chicago Yard and not the Whiting starting time.

Therefore, on the merit of the claim, time is claimed as specified in "Statement of Claim" in this case.

Carrier's Statement of Facts: Prior to July 27, 1934, the intra plant switching and the terminal work within the Standard Oil Company yard at its refinery at Whiting, Indiana, was performed by plant engines manned by crews in the employ of the Standard Oil Company. According to the best information available the industry worked a maximum of seven (7) regular engines daily and such additional extra engines as might be found necessary due to the volume of business. These engines were started at such times as the plant management required without regard to regularity or continuity.

On July 27, 1934, the Elgin, Joliet and Eastern Railway Company took over this service and by agreement with the representatives of the several classes of interested employes commenced to work in this yard with the understanding with its employes that provisions of Article 6 of the Yardmen's Agreement and similar agreements with other interested employes could not be adhered to, but that as the work progressed the starting time of the yard engines would be rearranged to conform as closely as possible with the starting times provided for in said agreements. Owing to plant operations some of these engines were

started at times at variance therewith until November 15, 1938, on which date all engines were started at the times specified in the schedule. This was done by a letter agreement with the General Chairman of the B. of R. T. dated October 28th, 1938, and with the distinct understanding with the representatives of the several classes of the interested employes that if after a ninety (90) day trial period it was found that such starting times did not result in efficient and economical operation or in satisfaction to the employes and to the industry that these representatives would meet with the Management and attempt to work out a schedule of starting times that would fit the requirements of the industry and satisfy as far as possible the interest of the employes.

Position of Carrier: Shortly before July 27th, 1934, the Executive Officers of the Elgin, Joliet and Eastern Railway Company, hereinafter called the "Carrier," were approached by Officials of the Standard Oil Company, hereinafter called the "Industry," and a proposal made
33 that the Carrier take over the plant switching, which under its tariffs it holds itself out to do, and also to perform the terminal work for all of the railroads serving the plant. There are four (4) railroads other than the Carrier serving this plant with their own rails, but in the interest of economy and efficiency it was desirable that one (1) railroad do all of the terminal work.

A conference was held with the representatives of the engineers, the firemen and the yardmen employed by the Carrier, on July 24th, 1934, and the situation discussed in all its details including the starting time. The performance of the plant switching by the Carrier was recognized as being desirable by both the Carrier and its employes, and it was understood at the outset that there could be no adherence to the general rules governing starting time, but that after the work had been handled for a sufficient time to determine what could be done, an effort would be made to conform as nearly as possible to the starting times provided for in Article 6 of our Yardmen's agreement and similar provisions in agreements with the other interested employes. This was done and during the period July 27, 1934, to November 15, 1938, many of the engines were started at the scheduled hours, or very nearly so. There were some engines, however, that because of plant operation were required at times during the day which made it

necessary to start them at other than the exast times provided for in Article 6 of the Yardmen's agreement. This was principally due to the necessity of taking care of the peak business.

Negotiations were carried on with the representatives of the employes during the period between July 27, 1934 and October 28, 1938, relative to the efforts being made to bring the starting time of these engines more closely in conformity with the general rules and in the latter part of 1936 the following complaint was submitted to your Honorable Board ex parte by the General Chairman of the B. of R. T. identified as Docket No. 3537—

"Complaint of employes that yard engines in the plant of the Standard Oil Company at Whiting, Indiana, are being started at times other than those provided in Article 6 of the Yardmen's Agreement."

This and several other cases filed by the B. of R. T., which were before the Board, were settled by a letter agreement, excerpts from which bearing on this particular case are quoted below:

"October 28th, 1938.

Mr. C. H. Williams,
General Chairman, Brotherhood of Railroad Trainmen,
603 Jackson Street,
Joliet, Illinois.

Dear Sir:

Since my letter of August 18th in which I tentatively proposed settlement of certain matters of grievance we have had further correspondence and conferences which have modified our decision in some cases. Therefore, in order that the whole matter be placed in concrete form I am outlining below our proposals to settle all of the cases except as otherwise specified.

* * * * *

Case No. 5—Labor Board docket No. 3537—Starting Time of Switch Engines in Whiting S. O. Yard.

Settled by agreement* that the starting times, for a ninety day trial period commencing November 15th, 1938, shall be the times provided for in Article 6 of the Yardmen's Agreement instead of the starting times heretofore agreed upon and now being followed. If at the end of the ninety day trial period the Railway Company or its employes claim that the starting times as fixed in Article 6 do not result in efficient and economical operation and in

satisfaction to our employes and to the industry served, then representatives of the Railway Company and representatives of the Yardmen and representatives of the Engineers and representatives of the Firemen will sit down and work out a schedule of starting time best suited for meeting the special requirements of the industry.

* * * * *

We have by this letter given you a complete resume of all of the claims which have not heretofore been disposed of, filed by you on behalf of the employees whom you represent and have proposed in this letter a very liberal disposition of all of the cases involved. The settlements proposed are predicated on a complete settlement and withdrawal of all cases now pending either before the Board, or under discussion with this office except Case No. 4, which it is understood will be left to a decision by the National Railroad Adjustment Board, and it is further understood that in the event settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement.

Your truly,

(Signed) S. M. Rogers,
President.

Accepted for the Yardmen: Oct. 31, 1938

(Signed) C. H. Williams,
General Chairman, B. of R. T.

(Signed) S. F. Johnson,
Secretary, B. of R. T."

* Note—The agreement referred to was a verbal agreement which the letter confirmed.

Accordingly, the Carrier and General Chairman Williams jointly notified the Board by letter to Secretary T. S. McFarland dated October 31, 1938 that these cases were settled and on the same date Secretary McFarland addressed a joint letter to Mr. A. F. Whitney, President B. of R. T. and Mr. S. M. Rogers, President of the Carrier, stating that these claims were removed from the Docket of the Board. A copy of this letter was sent to General Chairman Williams by Secretary McFarland.

The claim in dispute has no merit whatsoever and in presenting it to the Carrier, General Chairman Williams violated the following part of the aforesaid letter agree-

ment dated October 28th, 1938, executed by the Carrier and General Chairman Williams and Secretary Johnson of the B. of R. T.

"The settlements proposed are predicated on a complete settlement and withdrawal of all cases now pending either before the Board, or under discussion with this office except Case No. 4, which it is understood will be left to a decision by the National Railroad Adjustment Board, and it is further understood that in the event these settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement." (Underscoring mine.)

34 The underscored wording specifically provides that the settlement accepted for the Yardmen by the General Chairman and Secretary of the B. of R. T. was a complete settlement of the complaint in Docket No. 3537 and that such acceptance covered not only the complaint in Docket No. 3537 but "all claims of a similar nature." In accepting the settlement, General Chairman Williams further agreed by the positive and unmistakable terms quoted above that—"no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement." This clearly and definitely means that by his acceptance of the settlement, General Chairman Williams agreed that the Yardmen were not to present to the Carrier any claims incident to, connected with or growing out of the complaint in Docket No. 3537.

While, of course, the Carrier has not seen the ex parte submission of the employes, we assume General Chairman Williams will claim therein, as he did in a letter to the undersigned dated March 28, 1939, that there was no agreement made on July 24th, 1934 between the carrier and the representatives of the several classes of employes interested, including Mr. L. A. Hyde, then General Chairman of the B. of R. T., which authorized the Carrier to start some of tis engines in the industry at times other than those specified in our Yardmen's agreement. In effect, he stated in that letter that if such an agreement was made it was not made with his Committee, and because it was not in writing it could not bind the present Committee.

This, to say the least, is a very unusual position to take. We positively state that there was a verbal agreement made on July 24th, 1934 between the Carrier and the representatives of the several classes of employes interested which authorized the Carrier to start some of its engines in the Industry at times other than those specified in our Yardmen's agreement and that General Chairman Williams was aware of its existence and terms, which he acknowledged, by his acceptance of the terms of the letter agreement dated October 28, 1938. The existence of this verbal agreement is unquestionably substantiated by the following language in the aforesaid letter agreement signed by Messrs. Williams and Johnson.

"Settled by agreement that the starting times for a ninety day trial period commencing November 15th, 1938, shall be the times provided for in Article 6 of the Yardmen's Agreement instead of the starting times heretofore agreed upon and now being followed." (Underscoring mine.)

If it were not for the recognition of the aforesaid verbal agreement—

(a) It is obvious that Mr. Williams, or his predecessor would have presented the instant claim immediately after the expiration of the claimed thirty-day period mentioned in the "Note" below the "Statement of Claim" and not four and one-half years after the agreement was made, or

(b) He would have made the instant claim part of the claim covered by Docket No. 3537 and

(c) He would have taken exception to the provisions of the settlement reading "instead of the starting times heretofore agreed upon and now being followed."

General Chairman Williams does not even now contend that there was no agreement made waiving the provisions of Article 6 of the Yardmen's agreement. On the contrary he admits in the presentation of his case that there was such an agreement but claims that it expired on August 26, 1934.

At this point the Carrier wishes to state positively that there was not connected with the agreement of July 24, 1934, any restrictions as to the period during which the provisions of Article 6 of the Yardmen's Agreement, and similar provisions in the agreements with the engineers and firemen, would be waived. This thirty (30) day limitation now claimed was never mentioned in conversations

or correspondence regarding the subject of the starting time in the Industry until ovember 3, 1938, when Chairman Meade of the B. of L. F. & E. referred to it casually in a conversation with the Vice President of the Carrier, at which time the statement that there was any such restriction was promptly denied by the Vice President.

It is very significant that in all of the negotiations regarding the arrangement of the starting time which have been carried on from time to time during the past 4½ years, that there was never, until the claim referred to, which has been filed with the Board by the B. of L. F. & E. and covered by Docket No. 6788, any denial on the part of any of the Committees that there was an agreement waiving the starting time rule, or claim made that such an agreement was limited to a thirty (30) day—or any other specified period.

The subject of starting time in this yard has been one of correspondence and conference with the General Chairman of the B. of R. T., but until March 15, 1939, when a claim for time was presented to the General Manager of the Carrier, neither the present Chairman of the B. of R. T., nor his predecessor, with whom the agreement was actually made, has ever denied the existence of such an agreement or claimed that there was any time limit involved in it. As a matter of fact it would have been impossible for this Carrier to agree to a time limit when the work was taken over, because, as it explained to the representatives of the employes, it had no knowledge of how the work was performed in the plant and would not be able to make any definite statements with respect to changes in the method of operation until it had an opportunity to see what could be worked out. This referred particularly to the starting times, and while the Carrier did agree that it would, insofar as it might be practicable, start engines at the times specified in the agreement it said that there might have to be exceptions made.

It is not at all unusual to make exceptions to starting time in connection with industrial switching. The switching and terminal service in an industrial yard is entirely different from the switching service performed in a Carrier's yard where schedule times can usually be adhered to without loss of efficiency. In handling work for an Industry the requirements of the plant are paramount and the engines must be started and worked in harmony with

the plant operation. As illustrative of these exceptions attention is called to those in Article 6 applied to other plants served by the Carrier.

"Starting time of yard crews on one, two or three 8-hour shifts will be as follows:

7:00 A. M., 8:00 A. M. and 8:30 A. M.
3:00 P. M., and 4:00 P. M.
11:30 P. M., 12 midnight and 12:30 A. M.

except in hot metal and cinder, coke over, Buffington and Waukegan districts, in one, two or three shifts, starting time will be 6:30 A. M., 7:00 A. M., 7:30 A. M., and 8:00 A. M., 2:30 P. M., 3:00 P. M., 3:30 P. M., and 4:00 P. M.; and 10:30 P. M., 11:00 P. M., 11:30 P. M., and 12 o'clock midnight.

Starting time for Stockton engines will be 6:30 A. M., 1:30 P. M. and 8:30 P. M.

Starting time for yard crews handling ore at South Chicago will be 6:00 A. M. and 1:00 P. M.

Starting time for yard crews handling coal and ore at Gary will be 6:00 A. M. and 1:00 P. M.

Starting time for yard crews assigned to coal loading and unloading at East Joliet will be 6:30 A. M."

35 It will be noted from the above that many exceptions were made on account of conditions which had to be met.

After the work in this plant had been assumed by the Carrier a great many changes were made in the starting time of the engines and through the cooperation of the plant considerable progress was made, until effective November 15, 1938, it was agreed that for a trial period of ninety days, all of the engines would be started at the times specified in the agreements.

In view of the foregoing the filing of this claim is not only a violation of the verbal agreement made on July 24, 1934, with the representatives of the yardmen, the existence of which is acknowledged by the acceptance of the terms of the letter of settlement dated October 28, 1938, but is also a violation of the very terms of that letter because the letter itself constitutes an agreement that "no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement." It is plain that this claim arises out of the cause complained of in the claim filed with the Board as Docket No. 3537, which

was withdrawn as a result of this settlement. Therefore, the Carrier respectfully requests that the claim be dismissed, but if further consideration is given to it the Carrier requests that oral hearing be granted and that it be given an opportunity to present witnesses.

All data submitted in support of the Carrier's position was presented to the employes and made a part of the particular question in dispute.

(Exhibits not reproduced.)

Findings: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The evidence shows that the parties to the agreement disposed of the claim here made by the letter of carrier dated October 28th, 1938, accepted by employes October 31, 1938.

Award.

Claim denied per Findings.

National Railroad Adjustment Board
By Order of First Division
Attest: (Sgd.) T. S. McFarland,
Secretary.

Dated at Chicago, Illinois, this 6th day of September, 1940.

36 And on, to wit, the 24th day of December, 1940, the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Notice in words and figures following, to wit:

Filed Dec. 24, 1940.

37 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—2341) * *

NOTICE.

To: Knapp, Allen and Cushing
208 South LaSalle Street,
Chicago, Illinois.

Please Take Notice that on Tuesday, December 24, A. D. 1940, in the forenoon or as soon thereafter as counsel may be heard, I shall appear before His Honor Judge John P. Barnes, in the room usually occupied by him as a courtroom, in the Federal Building, Chicago, Illinois, or in his absence before such other Judge as may be sitting in his place and stead, and shall then and there present a motion, a copy of which is herewith served upon you, and ask that an order be entered in accordance therewith.

At Which Time and Place you may appear if you so see fit.

John H. Gately,
Attorney for Plaintiffs.

Received a copy of the above and foregoing notice with motion attached, this 21st day of December, A. D. 1940, before the hour of 12:00 o'clock noon.

Knapp, Allen and Cushing.
Motion No. .....
Page No. .....

38 And on, to wit, the 24th day of December, 1940, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Motion to Strike in words and figures following, to wit:

49 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Dec. 24, 1940.
* * (Caption—2341) * *

MOTION TO STRIKE.

Now come the plaintiffs herein, by John H. Gately, their attorney, and move the court to strike the Motion to Dismiss filed herein by the defendant in the above entitled cause for the following reasons:

(1) That said Motion to Dismiss sets up new and additional evidentiary matter not covered by the complaint filed herein, namely, what amounts to a plea of release and also a plea of res adjudicata, both of which matters are properly pleadable under the rules of this court, namely, Rule 12, sub-paragraph (b) by a responsive pleading;

(2) That said Motion to Dismiss is also contrary to Rule 8 of the Rules of Civil Procedure of this court, which states that matters as set forth therein, shall be set forth in a pleading;

(3) That to properly hear the Motion to Dismiss as filed herein and any reply thereto, it would be neces-
40 sary for this court to hear evidence which cannot be done on a Motion to Dismiss.

Wherefore, your plaintiffs pray that the Motion to Dismiss filed herein, may be stricken and a rule entered upon said defendants to file their answer to the complaint filed herein within a short date to be fixed by the court, or that judgment may be entered herein in favor of plaintiffs.

John H. Gately,
Attorney for Plaintiffs, Harry M. Alderman, F. E. Beccue, W. R. Bramer, et al.

41 And afterwards, to wit, on the 24th day of December, A. D. 1940, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

Entered Dec. 24, 1940.

42 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—2341) * *

Tuesday, December 24, 1940.

Present: Hon. John P. Barnes, District Judge.

This day come the Plaintiffs by their attorney and enter their motion to strike Defendant's motion to dismiss which motion and the Defendant's motion to dismiss are set for hearing January 13, 1941.

Filed Jan. 13, 1941.

43 And on, to wit, the 13th day of January, 1941, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion for Summary Judgement in words and figures following, to wit:

44 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—2341) * *

MOTION FOR SUMMARY JUDGMENT.

The defendant, Elgin, Joliet and Eastern Railway Company, a corporation, by Harry I. Allen and Paul R. Conaghan, its attorneys, hereby moves the Court to enter summary judgment for the defendant, and in support of said motion, in accordance with the provisions of Rule 56 (b) of the Rules of Civil Procedure, the defendant refers this Court to be affidavit of T. E. Bond heretofore filed in this Court, attached to the motion of the defendant to dismiss the complaint herein.

Harry I. Allen,
Paul R. Conaghan,
Attorneys for Elgin, Joliet and Eastern Railway Company, a corporation, defendant,
208 S. LaSalle Street, Chicago, Ill.

45 And on, to wit, the 29th day of January, 1941, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Reply to Motion in words and figures following, to wit:

46 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Jan. 29, 1941.
* * (Caption—2341) * *

REPLY TO MOTION SETTING UP PLEAS OF RES ADJUDICATA AND RELEASE ON A MOTION FOR A SUMMARY JUDGMENT.

Summary Judgment.

(1) A summary judgment should not be entered in this cause for either party because there are certain issues of fact involved herein that have been raised by the affidavits of the defendant and plaintiffs that should be tried by a jury;

(2) The letter under date of October 28, 1938, pleaded by the Defendant as a release in its motion, should not be considered as a release of the plaintiffs' individual claims against the Defendant for the following reasons:

(a) In order to be a valid release, there must be a proper subject matter, competent parties, a consent or meeting of the minds of the parties, and a valid con-
47 sideration. Plaintiffs' own exhibits demonstrate that one of the signers to the letter, C. H. Williams, did not understand the letter to be a release of the individual claims of the Plaintiffs herein, for immediately after the execution of said release, he filed what purported to be individual claims on behalf of the Plaintiffs herein, without authority, against the Defendant with the National Railroad Adjustment Board. It is also apparent that there was a total want of consideration. The affidavits also show that insofar as Williams is concerned, he was an incompetent party;

(b) The letter of October 28, 1938, upon examination, according to its own terms, cannot act as a valid release of the individual claims of the plaintiffs herein;

(c) C. H. Williams, as General Chairman of the Brotherhood of Railroad Trainmen, had no authority to present or compromise the individual claims of the plaintiffs. His authority was limited to prosecuting a complaint before the Board to compel the Defendant to comply with Article 6 of the agreement, by furnishing engines and work for the members of the Brotherhood at the times

specified in said "schedule" and the so-called release being a letter of October 28, 1938, was without consideration and therefore void.

(d) Officials of the Brotherhood of Railroad Trainmen, under the Constitution and rules, cannot release the claims of the individual members of the Union without specific authority so to do granted by the individual members themselves, nor can they submit to any compromise of any grievance without such a submission of which the Defendants had knowledge.

(3) The award of the National Railroad Adjustment Board cannot be considered as an adjudication of the
48 Plaintiffs' individual rights set up by a plea against the Plaintiffs herein because said Board was without jurisdiction of both of the parties and of the subject matter for the following reasons:

(a) The officials of the Brotherhood of Railroad Trainmen had no authority to present any individual claims of the Plaintiffs herein to the Defendant, nor to the National Railroad Adjustment Board, for consideration, because there had been no meeting of the Local Lodge authorizing the presentation of any grievances nor any forwarding of any authorization to the General Chairman, as required by the Constitution of the Brotherhood, of which the Defendant was aware;

(b) No notice was given to, nor received, by the Plaintiffs of the pendency of any hearing nor of the hearing held by the National Railroad Adjustment Board, under which the award pleaded herein was rendered;

(c) By the specific wording of the Statute under which said National Railroad Adjustment Board rendered its "award" pleaded herein, said award is not final nor binding on any of the parties thereto even though your Plaintiffs herein should be considered as having been proper parties to said proceeding because said Statute provides:

"Said award shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award."

(d) The Statute under which said award is pleaded, U. S. Code Annotated, Title 45, Paragraph 153, violates the due process clause, Fifth Amendment to the Federal Constitution, because in and by said Statute the defeated employee who is defeated before said Board has no right

of the review of any decision handed down by said
49 Board; but a defeated employer when the order on the award is sought to be enforced has a right of review in the Federal District Court, and the Appellate Court, and the United States Supreme Court;

(e) If it should be held that the National Railroad Adjustment Board acts merely as an arbitrator, then any decisions thereunder are void because it passes on matters and basis its decision and its opinion on law and fact which is contrary to public policy.

Wherefore, Plaintiffs herein move the court to overrule the Motion for summary judgment of the Defendant; and to hold that the letter dated October 28, 1938, is not a release of any claims of the plaintiffs herein, and that the award of the National Railroad Adjustment Board is either not a final adjudication as to the Plaintiffs herein; or that said award is void as to these Plaintiffs for lack of jurisdiction of the parties of the subject matter; or void because said Act under which award was entered is unconstitutional.

John H. Gately,
Attorney for Plaintiffs.

50 And on, to wit, the 29th day of January, 1941, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Counter Affidavit in words and figures following, to wit: Filed Jan. 29, 1941.

51 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—2341) * *

COUNTER AFFIDAVIT TO AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS.

State of Illinois, } ss.
County of Cook. }

We, the undersigned, being severally first duly sworn on oaths depose and says that we are some of the plaintiffs in the above entitled cause and that we make this as a counter-affidavit for ourselves and the other plaintiffs herein to the affidavit filed by the defendant herein and state as follows:

1) That the Brotherhood of Railroad Trainmen, a duly licensed association of railroad employees throughout the

United States of America, hereinafter referred to as the B. of R. T. entered into a schedule or working agreement with the Elgin, Joliet & Eastern Railroad Company, a corporation, hereinafter referred to as The Company, on behalf of all of its members working for the Defendant
52 on any of its lines or yards throughout the system of the Defendant, said agreement to be effective January 1, 1927. Said agreement was to be—"in effect until April 1, 1928, and thereafter until thirty days notice shall have been given by either party of their desire to change or terminate the same or any part thereof", and signed by P. F. McManus as General Superintendent and approved by J. M. Rogers as Vice President, both of the Elgin, Joliet & Eastern Railroad Company, a corporation, and by Samuel E. Wilson, General Chairman and W. L. Wall, Secretary, both of the B. of R. T. That said agreement still stands in full force and effect and that no notice of the abrogation or cancellation thereof has been given by either party thereto.

2) That on about July 24, 1934, many of the Plaintiffs herein had been working for the Standard Oil Company of Indiana, a corporation, as yardmen in their yard, located at Whiting, Indiana, and designated as "The Whiting Yard".

3) That in the early part of July, 1934, Plaintiffs desired to join the B. of R. T. and were advised by the Standard Oil Company that they would not operate the yard, but would turn the same over to the Defendant company herein.

4) That the plaintiffs herein who were then working at "The Whiting Yard" joined the B. of R. T. and that thereafter by proper resolution they had their duly elected officials meet with the officials of the Company for the purpose of reaching an agreement as to working conditions, hours, rates of pay, et cetera.

5) That said officials reached an agreement with the Company. Said agreement being that they would work under the "schedule" then in force dated January 1, 1927, that had been previously obtained by the B. of R. T. with the Company, subject however, to a thirty day suspension of Article 6 of said agreement.

6) That thereafter said officials of the B. of R. T. then called a special meeting of the members of the B. of
53 R. T. who had been working in the "Whiting Yard" and submitted said agreement to them for their con-

sideration and approval. That the said members after discussion thereon, voted upon, and accepted said agreement, which included the thirty day suspension of Article 6 and ratified the terms thereof.

7) That thereafter notice of the action of said members in the acceptance of said agreement was forwarded to the Grand Lodge of the B. of R. T. in Cleveland, Ohio, in accordance with the Constitution and by-laws of the B. of R. T., and the Company was notified of the acceptance of said "schedule" by the duly authorized officials of the members of the B. of R. T. working the "Whiting Yard."

8) That said plaintiffs herein thereafter appeared at the "Whiting Yard" to begin working for the Company, That when they talked to the local officials of said Company in reference to employment and when told that they were employed by the Company, they were also advised that they were to work under the "schedule" of the Company with the B. of R. T. to which they agreed, and many of them were given a copy of said "schedule" by said officials of said Company at that time.

9) That after said "schedule", or agreement, was entered into between the members of the B. of R. T. working in the "Whiting Yard" and the Company, and after the plaintiffs herein had entered into the employment of said Company and performed the duties thereunder, the Company, on August 27, 1934, refused to abide by Article 6 of said agreement in that it refused to furnish your Plaintiffs with engines or engine crews when they reported for duty at the times specified in Article 6 of said "schedule" as aforesaid, although the Plaintiffs were ready, willing and able to perform their obligations thereunder.

54 10) That numerous complaints were made to the officials of the Defendant Company in accordance with the "schedule" and in accordance with the B. of R. T. Constitution and rules, but that said Defendant persisted in refusing to abide by terms of Article 6 of said "schedule".

11) That thereafter, a meeting of the plaintiffs at lodge 281 of the B. of R. T., of which your Plaintiffs were members, was held and the officials of said lodge were authorized to present to the officials of the Company, the Plaintiffs' grievance against that Company for the failure and refusal to abide by their obligations as set forth in Article 6, and upon said B. of R. T. officials inability to persuade the officials of the Company to conform to the provisions of Article 6, your plaintiffs were informed that the officials

of the B. of R. T. were unable to persuade the Company to agree to abide by Article 6. Said officials of the B. of R. T. were then authorized to file a complaint with the National Railroad Adjustment Board to enforce the terms thereof and compel the Defendant to perform thereunder.

12) That the Company also refused to enter a stipulation of facts to be submitted to the National Railroad Adjustment Board, and that therefore, said officials of the members submitted said complaint to said board "ex parte" to endeavor to have said Board compel the Company to furnish your Plaintiffs with engines and the work as set forth in Article 6 of the "schedule".

13) That after the meeting authorizing the officials of the B. of R. T. to file the complaint for the enforcement of Article 6 of said "schedule" the Plaintiffs through their local foreman, filed time slips with the Company for the time due them by Defendant for its violation of Arti-
55 cle 6.

14) That neither these affiants nor any of the Plaintiffs in this cause did at any time authorize or direct C. H. Williams, as General Chairman of the B. of R. T. nor S. F. Johnson, as Secretary of the B. of R. T., to present or file with the National Railroad Adjustment Board, any of their personal claims against the Company herein.

15) That the Plaintiffs herein never authorized C. H. Williams, S. F. Johnson, nor anyone to sign said letter, and had no knowledge of the signing of the letter of October 28, 1938, set out as Exhibit C of the Defendant's affidavit, until a few days after the decision of the National Railroad Adjustment Board which was rendered September 6, 1940, and that they at no time have ever received any consideration from the Defendant Company herein nor from C. H. Williams, for the waiving of any claims as set out in said letter.

16) That the authority of C. H. Williams as Chairman, and S. F. Johnson as Secretary, to act for these Plaintiffs and for and on behalf of Lodge 281 of the B. of R. T. and the members thereof under the Constitution rules and regulations of the B. of R. T. is specifically limited; that the Defendant herein had knowledge of the limitations set up in said Constitution, rules and regulations, the pertinent parts thereof being attached hereto as Exhibit A.

17) That the Plaintiffs herein were not notified of any hearing, had no knowledge of any hearing, nor were they present at any hearing, wherein any adjudication of any

of their personal claims was to be passed on by the National Railroad Adjustment Board.

18) That your Affiants state that they have recently been informed that C. H. Williams was notified to
56 bring to the hearing of the National Railroad Adjustment Board, ten or fifteen of the Plaintiffs members hereof.

19) That said Williams and Johnson had no authority, express nor implied, from any of the Plaintiffs herein, to waive any claims of your Plaintiffs as set forth in the letter of October 28, 1938.

20) That C. H. Williams and S. F. Johnson failed to notify your Plaintiffs as members of Lodge 281 of the B. of R. T., at any time, of their "settlement of claims" as set forth in a letter of October 28, 1938.

21) That the Brotherhood of Firemen and Enginemen had also filed a complaint with the National Railroad Adjustment Board growing out of the same grievance and that the facts in their claim were identical with the facts under which the claim filed by C. H. Williams, purportedly in the Plaintiffs' behalf, and that on the same date that the award was rendered denying C. H. Williams' purported claim for Plaintiffs herein, an award was entered by the National Railroad Adjustment Board in favor of the Brotherhood of Firemen and Enginemen, a copy of said award being attached hereto as Exhibit B.

Further Deponents Sayeth Not.

L. S. Christine,
F. E. Beccue,
J. C. Newman,
G. W. Burley.

Individually subscribed and sworn to before me, a Notary Public, this 27th day of January, A. D. 1941.

Hyman M. Greenstein,
Notary Public.

(Seal)

57 **EXHIBIT A.**

Constitution and General Rules of the Brotherhood of Railroad Trainmen.

Officers and Duties of General Grievance Committee and Board of Adjustment.

Rule No. 3.

A General Grievance Committee shall not revise or change a general or system wage schedule or agreement unless authorized to do so by a majority vote of the lodges on the system or by a majority vote of the membership on the system if such vote is deemed advisable by the general committee, and it may, when authorized so to do, make and enter ito contracts of agreement not inconsistent with the law and policy of the Brotherhood, with the railroad, the employes of which it represents, concerning rates of pay and working conditions.

* * * * *

Failure of Local Committee to Adjust

Rule No. 7.

When the local chairman or grievance committee fails satisfactorily to adjust any grievance referred to it, as provided in the foregoing rules, and if the lodge so orders it, the secretary of the lodge shall immediately send a certified copy of the grievance to the chairman of the general grievance committee, and a duplicate copy of the grievance to the President of the Brotherhood. It shall be the duty of the chairman of the general grievance committee, on receipt of certified copy of grievance, to appoint a time for the consideration of the grievance, and to summon the secretary of the general grievance committee, and the chairman of the local grievance committee of the lodge where the grievance exists, to meet with him at an appointed time, in the city where the headquarters of the general superintendent or the general manager of the railroad, for that part of the system on which the grievance exists, is located. A committee thus constituted shall have power to alter, amend, add to or strike out or with the approval of the President refer to the Legislative Department of

the Brotherhood any part or all of any complaint or claim submitted to the committee, subject to appeal to the entire General Committee and/or Board of Appeals. A general grievance Committee may authorize their chairman to handle all grievances received from local lodges with the management for settlement, failing in this, he will so report to the Secretary of the General Grievance Committee and the Chairman of the Local Lodge where the grievance exists to determine further handling.

Notification of Action on Grievances

Rule No. 8½.

Any Local, Sub or General Committee or Board of Adjustment making decision, closing out cases, accepting
58 settlements for grievances referred to them, will within thirty days from date of such action notify the Secretary of the lodge where grievance originated and the member or members filing grievance of such action and the notification to be made in writing. If the seniority of a member of some other lodge on the system is affected by such decision the member affected and the secretary of his lodge will be notified in writing.

• • • • •

General Rule 5.

All grievances must be handled by the regular local grievance committee before being referred to the general grievance committee for adjustment. Special committees cannot be appointed by the lodge for the purpose of presenting grievances because it may be thought the members of the regular committee do not favor the matter in hand.

59 EXHIBIT B.

Award No. 5049
Docket No. 6788

National Railroad Adjustment Board

First Division

The First Division consisted of the regular members and in addition Referee Paul W. Richards when award was rendered.

Parties to Dispute:

Brotherhood of Locomotive Firemen and Enginemen

Elgin, Joliet and Eastern Railway Company.

Statement of Claim: Claim for an additional day at time and one-half, at the regular daily rate, from August 26th, 1934, until the Company complies with the schedule starting time rule, for each and every fireman working in the Standard Oil Plant, Whiting, Indiana, for each and every day he was obliged to start work, at other than the schedule starting time. Claim is further made that any analogous violations of starting time rules which may have occurred subsequent to August 26th, 1934, shall be adjusted in accordance with the above claim.

Employes' Statement of Facts: On July 24th, 1934, the V. Pres. of the E. J. & E. R. R., held a meeting with the Engineers', Firemen's and Trainmen's Committees to arrange for the handling of the new work being taken over, namely; the industrial switching in the Standard Oil Plant, Whiting, Indiana. At this meeting it was verbally agreed by all concerned, to allow the Company thirty days from July 27th, 1934, in which to comply with the starting time rules of the several schedules. On July 27th, 1934, the E. J. & E. Ry. did take over the above mentioned switcher, but to date they have not complied with the Firemen's schedule starting time rule. The B. of L. F. & E. starting time rule reads in part;

Article (10). Par. (A), regularly assigned yard crews will each have a fixed starting time, and the starting time of a crew will not be changed without at least forty-eight hours advance notice. Present practice as to the handling of the transfer crews is not affected by the foregoing.

Par. (B), Starting time of switch engines on one, two or

three eight hour shifts will be as follows; 7:00 A. M., 8:00 A. M., and 8:30 A. M.; 3:00 P. M. and 4:00 P. M.; 11:00 P. M., 12 midnight and 12:30 A. M.

On July 27th, 1934, there were eight yard engines working on the following starting times;

One engine at	6:30 A. M.		One engine at	4:30 P. M.	
" " "	9:30 A. M.		" " "	7:30 P. M.	
" " "	10:30 A. M.		" " "	10:30 P. M.	
" " "	3:30 P. M.		" " "	11:30 P. M.	

The only engine that was being started on the schedule starting time was, the 11:00 P. M. engine. Some of the engines starting times were changed between July 27th, 1934, and the present. Additional yard engines have been added, making a total of twelve engines now working.

This case was handled in the usual manner, including conferences with the Pres. of the railway. The interested parties being unable to agree on a statement of facts, the employes herewith present the case ex parte and desire oral hearing.

Position of Employes: An effort was made to adjust this case with Mr. J. E. Rielly, General Supt., on Oct. 10th, 1934, without satisfaction. On Jan. 2nd, 1935, the case was handled with Mr. S. M. Rogers, the Pres. of our railroad, without satisfaction. On several subsequent dates this case was handled, but the Company would not comply with the schedule starting time rules. On Dec. 6th, 1938, we requested Mr. T. E. Bond, V. Pres., of our railroad, to join us in submitting this case to the N. R. A. B., Div. 1. Mr. Bond could not agree with us on the statement of facts, therefore, we are obliged to submit ex parte.

We maintain, the only time the Company was privileged to start an engine off the regular starting time was, during the thirty day period from July 27th, 1934, to Aug. 26th, 1934, both dates inclusive. You will note there is around the clock service in this plant. You will also note, the starting times are specific and do not provide different starting times, where two shifts are worked in, or not in continuous service, nor is an independent assignment given a different starting time.

The employes wish to cite, in further support of their claim, N. R. A. B. Div. 1, Awards 916, 917, 1232, 1233, 1247, 2947, 3065, 3072, and 3096.

Carrier's Statement of Facts: Prior to July 27th, 1934, the intra plant switching and terminal work within the

Standard Oil Company Yard at its refinery at Whiting, Indiana, was performed by plant engines manned by crews in the employ of the Standard Oil Company. According to the best information available the industry worked a maximum of seven (7) regular engines daily and such additional extra engines as might be found necessary because of the volume of business. These engines were started at such times as the plant management required without regard to regularity or continuity.

On July 27th, 1934, the Elgin, Joliet and Eastern Railway Company took over this service and subsequent thereto, rearranged the starting time of the yard engines to conform as closely as possible with the starting times provided for in Article 10 of the Firemen's Agreement, but owing to plant operations some of the engines were started at times at variance therewith until November 15th, 1938, on which date all engines were started at the times specified in the schedule, but with the distinct understanding with the representatives of the several classes of interested employes that if after a ninety (90) day trial period it was found that such starting times did not result in efficient and economical operation or in satisfaction to our employes and to the industry that these representatives would meet with the Management and work out a schedule of starting times that would fit the requirements of the industry and satisfy as far as possible the interest of the employes.

Position of Carrier: Shortly before July 27th, 1934, the Executive Officers of the Elgin, Joliet and Eastern Railway Company, hereinafter called the "Carrier," were approached by Officials of the Standard Oil Company, hereinafter called the "Industry," and a proposal made that the Carrier take over the plant switching, which under its tariffs it holds itself out to do, and also to perform the terminal work for all of the railroads serving the plant. There are four (4) railroads other than the Carrier serving this plant with their own rails, but in the interest of economy and efficiency it was desirable that one (1) railroad do all of the terminal work.

A conference was held with the representatives of the engineers, the firemen and the yardmen employed by the Carrier, on July 24th, 1934, and the situation discussed
60 in all its details including the starting time. The performance of the plant switching by the Carrier was recognized as being desirable by both the Carrier and its employes, and it was understood at the outset that there

could be no adherence to the general rules governing starting time, but that after the work had been handled for a sufficient time to determine what could be done, an effort would be made to conform as nearly as possible to the starting times provided for in our agreement. This has been done and during the period July 27, 1934, to November 15, 1938, many of the engines were started at the scheduled hours, or very nearly so. There were some engines, however, that were required at times during the day which made it undesirable to start them at the exact time provided for in Article 10 of the Firemen's Agreement. This was due to the necessity of taking care of the peak business.

The understanding reached at the conference on July 24, 1934, is outlined in detail in a letter from the Vice President of the Carrier to General Chairman Meade, representing the Firemen, dated November 16, 1938 (copy of which is attached hereto as Carrier's Exhibit "A" and made a part hereof) and is in response to a request from Mr. Meade (Carrier's Exhibits "B" and "C") to join his organization in presenting the subject of this controversy in joint submission to your Honorable Board. Refusal of the Carrier to join in submitting this case was because the "facts" as presented in the proposed submission were not correct.

In the proposed Joint Statement of Facts the statement was made that—"At this meeting (referring to the meeting of July 24th, 1934.) it was verbally agreed by all concerned to allow the Company thirty (30) days from July 27th, 1934, to comply with the starting time of the several schedules." At the conference referred to there was no such agreement, or understanding. In fact the thirty (30) day period had never been mentioned in correspondence or conferences until at a meeting between Carrier's Vice President and Mr. Meade on November 3rd, 1938, where this case and other matters were discussed, Mr. Meade referred to the thirty (30) day time limit, and at this meeting, (November 3rd, 1938) as confirmed in the Vice President's letter dated November 16th, 1938, (Carrier's Exhibit "A") it was denied by the Carrier that there ever was any such understanding with respect to a definite time limit.

Article 10 of the Firemen's Agreement, which the complainant seeks to have applied, provides for the same starting time as Article 1 of our Engineers' Agreement and Article 6 of our Yardmen's Agreement, and was agreed

upon effective as of February 15th, 1923,—more than eleven (11) years before the switching operation of the Industry Plant was undertaken by the Carrier. Had the Carrier been doing the work at the Industry's plant at the time Article 10 was agreed upon, undoubtedly exceptions thereto would have been made to cover the conditions existing at this plant the same as were agreed to in other cases where circumstances and conditions existed which were recognized as warranting different starting times. For example, Article 10 of the Firemen's Agreement provides in part as follows:

"Starting time of switch engines on one, two or three 8-hour shifts will be as follows:

7:00 A. M., 8:00 A. M. and 8:30 A. M.
3:00 P. M., and 4:00 P. M.
11:00 P. M., 12 midnight and 12:30 A. M.

except in hot metal and cinder, coke oven, Buffington and Waukegan districts, in one, two or three shifts, starting time will be 6:30 A. M., 7:00 A. M., 7:30 A. M., and 8:00 A. M., 2:30 P. M., 3:00 P. M., 3:30 P. M. and 4:00 P. M.; and 10:30 P. M., 11:00 P. M., 11:30 P. M., and 12 o'clock midnight.

Starting time for Stockton engines will be 6:30 A. M., 1:30 P. M. and 8:30 P. M.

Starting time for switch engines handling ore at South Chicago will be 6:30 A. M. and 1:00 P. M.

Starting time for switch engines handling coal and ore at Gary will be 6:00 A. M. and 1:00 P. M.

Starting time for engines assigned to coal unloading jobs at East Joliet will be 6:30 A. M."

It will be noted from the above that many exceptions were made on account of conditions which had to be met.

As evidence that not only were there exceptions with respect to the starting time rule agreed upon in the taking over by the Carrier of the work formerly performed by the Industry, but other departures from the schedule were made by agreement. For example—some of the employes of the Industry handling the engines were, at the request of the General Chairman of the B. of L. F. & E., taken into the employ of the Carrier as firemen, hostlers, cinder pit men, etc., with prior rights in the Industry's yard but without system rights. The firemen of the Carrier agreeing through their representatives not to displace the men employed as firemen, who were taken over from the Indus-

try by the Carrier, and on the other hand, the men so taken over acquired no seniority rights at any other point on the System, this being an exception to Article 14 of the Firemen's Schedule which reads—

"System rights shall govern firemen on the Elgin, Joliet and Eastern Railway. This means that firemen will be allowed to make application for all vacancies on the System."

and also constitutes an exception to Article 33 of the Firemen's Schedule—which provides in Paragraph (A) thereof—

"In case of reduction in force, unless otherwise provided, fireman will be given the privilege of taking youngest man's engine in any class of service on any division or sub-division, except regular assigned runs, or pools, where oldest men will be given the preference to runs."

The switching and terminad service in an industrial yard is entirely different from the switching service performed in a Carrier's yard where scheduled times usually can be adhered to without loss of efficiency. In handling work for an Industry the requirements of the plant are paramount and the engines must be started and worked in harmony with the plant operation.

The Officials of the Industry cooperated with the Carrier in its efforts to plan the work so that regular starting times, as nearly as possible conforming with out agreements, could be established, and as stated many of the engines were started either on the exact hour prescribed therein or nearly so. But the representatives of the Firemen and the Yardmen still insisted that further changes could be made in the handling of the work, so in order that the Carrier might have the benefit of a considered opinion, the Management suggested that representatives of the Engineers, Firemen and Yardmen, together with Operating Officials of the Carrier, make a study of the situation and submit such recommendation as to changes which in their opinion could be put in force without interfering with the operation of the Industry, it being recognized by all that this is a highly competitive situation and that the necessity of satisfying the plant must be borne in mind.

The suggestion that a study be made of the situation was made at conferences with representatives of the Yardmen and Firemen when this subject was brought up, and on

May 11, 1935, a letter was addressed to Mr. Meade, General Chairman of the Firemen's Committee and Mr. L. A. Hyde, then General Chairman of the Yardmen's Committee, suggesting a joint conference with their Committees and the Committee representing the Engineers. This letter was never replied to, nor was the subject again mentioned until it was brought up at a conference between the Carrier and the Committees representing the Yardmen and
61 Firemen on March 19th and 20, 1936, during the proceedings of which some mention was made of the subject although not on the docket of subjects to be considered at the meeting. It was discussed in an informal manner and again the suggestion was made that a study should be entered into and proposal for any changes be submitted. The only action which was ever taken on this suggestion was a conference held at the Industry's plant on October 22nd, 1936 between representatives of the interested employes and the Operating Officials of the Carrier, but no concrete suggestions were forthcoming from the employes.

In order that the experiment might be given a full and fair trial the Carrier agreed on October 28th, 1938, with our employes to start all engines in the Industry's plant, commencing November 15th, 1938, at the times provided for in the agreements with the several classes of interested employes. This was done with the understanding that if at the end of a ninety (90) day trial period the Carrier, or its employes claim that the starting time provided for in said agreements do not result in efficient and economical operation and in satisfaction to our employes and to the Industry served, then the representatives of the Carrier, representatives of the Firemen, representatives of the Engineers and representatives of the Yardmen will meet with the Carrier nad work out a schedule of starting times best suited for meeting the special requirements of the Industry. This understanding was arrived at through correspondence and conferences with the Yardmen—their representatives having urged that such a trial be made, and by telephone conversation with General Chairman of the Firemen and General Chairman of the Engineers. As having a very direct bearing on the understanding of the representatives of the employees regarding the starting time of engines prior to November 15th, 1938, the following is quoted from the letter agreement covering this, and other

subjects, written October 28th, 1938, by President Rogers of the Carrier to General Chairman Williams of the B. of R. T. representing the Yardmen and accepted by him for the Yardmen as of October 31, 1938.

Case No. 5—Labor Board Docket No. 3537—Starting time of switch engines in Whiting S. O. Yard."

"Settled by agreement that the starting times, for a ninety day trial period commencing November 15th, 1938, shall be the time provided for in Article 6 of the Yardmen's Agreement instead of the starting times heretofore agreed upon and now being followed. If at the end of the ninety day trial period the Railway Company or its employes claim that the starting times as fixed in Article 6 do not result of efficient and economical operation and in satisfaction to our employes and to the industry served, then representatives of the Railway Company and representatives of the Yardmen, and representatives of the Engineers and representatives of the Firemen will sit down and work out a schedule of starting time best suited for meeting the special requirements of the industry."

As a result of this agreement this case was withdrawn from the Board by a letter dated October 31st, 1938, to Secretary McFarland, signed jointly by President Rogers and General Chairman Williams of the Yardmen. Receipt of this letter was acknowledged by Secretary McFarland of the National Railroad Adjustment Board, First Division, on the same day, October 31st, 1938. This complaint of the Yardmen is referred to not because it is claimed that any agreement with the Yardmen would be binding upon the Firemen, but because is distinctly sets forth the understanding of both parties of the situation which existed prior to November 15th, 1936, and in the case filed by the Yardment there is no contention that such an understanding was not in force but only a request for an order from the Board requiring the Carrier for the future to start engines as provided in the schedule. An amicable agreement having been reached with the Yardmen with respect to a trial period, there was no necessity for the continuance of the case. The meeting on July 24th, 1934, having been a joint conference attended by representatives of the Firemen, Engineers and Yardmen the understanding of all must have been alike.

There was no violation of Article 10 of the Firemen's

Agreement because the waiver of the provisions of this Article was specifically agreed to by representatives of the Firemen, and while there were some departures from the starting time of yard engines provided in the Article the situation was thoroughly discussed and was understood by all interested.

The Carrier's submission covers that portion of the claim which refers to an additional day at time and one-half at the regular daily rate from August 26th, 1934, for firemen employed in the Standard Oil Plant at Whiting, Indiana, but it has no knowledge of what is meant by the concluding paragraph of the Statement of Claim, which reads—

"Claim is further made that any analogous violations of starting time rules which may have occurred subsequent to August 26th, 1934, shall be adjusted in accordance with the above claim."

Therefore, if consideration is to be given to that portion of the Statement of Claim, the Carrier insists that it must have further and more detailed information as to just what is meant by—"analogous violations of starting time rules."

The Carrier respectfully requests that this claim be denied.

Oral hearing is requested and an opportunity to present witnesses.

All data submitted in support of the Carrier's position was presented to the employes and made a part of the particular question in dispute.

(Exhibits not reproduced.)

Findings: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The record shows instances in which claimants were required to start work at hours other than those agreed upon in Article 10 (B). This constituted a violation of said article. In each instance the claimant is entitled to an adjustment of compensation as though he had in fact

been started to work not later than the next preceding hour fixed in Article 10 (B) for starting work.

Award.

Claim disposed of per Findings.
National Railroad Adjustment Board,
By Order of First Division.
Attest:(Sgn.) T. S. McFarland,
Secretary.

Dated at Chicago, Illinois, this 6th day of September, 1940.

62 And on, to wit, the 6th day of February, 1941, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Memorandum of Reply to Plaintiffs' motion to Strike, etc. in words and figures following, to wit: Filed Feb. 6, 1941.

63 In the District Court of the United States.
* * (Caption—2341) * *

MEMORANDUM OF REPLY TO: I. PLAINTIFFS' MOTION TO STRIKE; II. COUNTER-AFFIDAVIT OF PLAINTIFFS; III. PLAINTIFFS' ANSWER RELATING TO "RES ADJUDICATA AND RELEASE" SET FORTH IN DEFENDANT'S MOTIONS; IV. MEMORANDUM BRIEF IN ANSWER TO DEFENDANT'S MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT.

In this reply defendant will consider the various procedural and substantive matters submitted to this Court for decision in the order as hereinabove set forth as subdivisions to the title of this memorandum.

I.

Reply to Plaintiffs' Motion to Strike.

On December 24, 1940, plaintiffs filed a motion to strike defendant's motion to dismiss the complaint and the affi-

davit of the defendant in support of its motion because
64 the motion to dismiss set forth additional evidentiary matters not alleged in the complaint. The plaintiffs stated in their motion to strike that these evidentiary matters should be set forth by the defendant in a responsive pleading and not in an affidavit in support of a motion to dismiss. Subsequently, the defendant filed a motion for summary judgment and in support thereof relied upon the facts set forth in the affidavit in support of defendant's motion to dismiss. When the matters came for hearing before this Court on January 13, 1941, this Court entered a rule upon the plaintiffs to file counter-affidavits.

71 **II.**

Reply to Counter-Affidavit of Plaintiffs.

Four of the twenty-three plaintiffs subscribed their names to the counter-affidavit which they stated was made "for ourselves and the other plaintiffs." We respectfully submit that an individual plaintiff cannot make an affidavit for another individual plaintiff in a case which seeks to impose a liability for each individual plaintiff against the defendant.

The facts set forth in the counter-affidavit, even if true, which the defendant does not admit, do not present triable issues of fact. All of the facts set forth in the defendant's affidavit and the exhibits attached thereto are expressly admitted by the plaintiffs. The only substantive question presented to this Court for determination is whether the facts set forth in the affidavit of the defendant and the exhibits, when considered with the facts set forth in the plaintiffs' affidavit, present a question of law upon which this Court shall render judgment for the defendant.

The facts set forth in the plaintiffs' counter-affidavit are immaterial facts and show clearly that there is no genuine factual issue.

The counter-affidavit admits (Paragraph 11) that the officials of the local lodge of the Brotherhood of Railroad Trainmen of which the plaintiffs were members "were
72 authorized to present to the officials of the company, the plaintiffs' grievance against that company for the failure and refusal to abide by their obligations as set forth in Article 6* * *." Thereafter, the affidavit states

the "officials of the B. of R. T. were then authorized to file a complaint with the National Railroad Adjustment Board to enforce the terms thereof and compel the defendant to perform thereunder."

Pursuant to this express authority, as shown by the counter-affidavit of the four plaintiffs, the General Chairman of the Grievance Committee of the Brotherhood of Railroad Trainmen, the designated representative of the plaintiffs for collective bargaining purposes, filed the first complaint before the National Railroad Adjustment Board on November 23, 1936, as shown by Exhibit "A" attached to defendant's affidavit in support of its motion to dismiss. This complaint on November 23, 1936, was assigned Docket No. 3537 by the Adjustment Board. (Exhibit "B" attached to defendant's affidavit.)

Subsequently, on October 31, 1938, the Grievance Committee of the Brotherhood of Railroad Trainmen and the President of the defendant railway company compromised this claim. This compromise was made in accordance with the duty imposed upon the carrier and the designated representative of its employees by the provisions of the Railway Labor Act (45 U. S. C. A. § 152, Paragraphs First and Second) requiring the parties "to make and maintain agreements concerning rates of pay, rules and working conditions and to settle all disputes, whether
73 arising out of the application of such agreements or otherwise * * *." The signatures of the designated representatives of the employees are set forth on page 8 of Exhibit "C" attached to the affidavit filed by the defendant in support of its motion to dismiss. The counter-affidavit of the plaintiffs admits the execution of this document by the Chairman and Secretary of the Grievance Committee of the Brotherhood. This compromise agreement was not intended to be a partial settlement. The compromise agreement expressly provided otherwise. The intention of the parties as expressed in the agreement is clear and unambiguous. We repeat the final paragraph of the compromise agreement:

"We have by this letter given you a complete resume of all of the claims which have not heretofore been disposed of, filed by you on behalf of the employes whom you represent and have proposed in this letter a very liberal disposition of all of the cases involved. The settlements proposed are predicated on a complete settlement and with-

drawal of all cases now pending either before the Board, or under discussion with this office except Case No. 4, which it is understood will be left to a decision by the National Railroad Adjustment Board, and it is further understood that in the event these settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement."

This letter of compromise dated October 28, 1938, and accepted by the officials of the Brotherhood on October 31, 1938, is a typical example of collective bargaining as practiced daily throughout the United States by rail-
74 roads and designated representatives of employees.

In this letter (Exhibit "C" attached to the affidavit filed by the defendant in support of its motion to dismiss) disposition was made of thirty-eight cases, some of which were pending before the Adjustment Board and some of which were not filed by the Brotherhood before the Adjustment Board. All cases related to rates of pay, rules and working conditions of employees of the defendant and cases numbered 8, 9, 10, 11, 13, 14, 15, 16, 17, 23, 24, 36, 38, 39, 40, 41, 42, 44, 45, 50 and 54 (a), (b), (c) and (d) related to time claims for the payment of money varying from the amount of $7.94 to some individuals to the amount of $951.30 to another individual (Case 17). More than seventy-two individuals, employees of the defendant, received money or time claims as a result of this compromise agreement executed by the officials of the Brotherhood on October 31, 1938. Included among the individuals who were seeking money from defendant at this time were H. M. Alderman (Case 43), J. M. Harr (Case 43), J. Harr (Case 45), H. Alderman (Case 50), and T. J. Murray (Case 50), plaintiffs herein.

After the execution of this compromise agreement the General Chairman of the Grievance Committee of the Brotherhood of Railroad Trainmen executed a letter dated October 31, 1938, addressed to the Adjustment Board (Defendant's Exhibit "D" attached to the affidavit in support of its motion to dismiss) advising that "The following cases have been settled and we, therefore, jointly

request that they be withdrawn from the Docket of the Board. * * * National Railroad Adjustment Board Docket No. 3537. Complaint of employees that yard engines
75 in S. O. Company plant are being started at times other than those provided in Article 6 of the Yardmen's Agreement * * *." That letter (Exhibit "D") also is a typical example of collective bargaining as daily practiced throughout the United States by carriers and designated representatives of employees. This collective bargaining, practiced for many years by the defendant and the designated representatives of the employees, is required by the Railway Labor Act of 1934.

77 The plaintiffs and the defendant admit that the Brotherhood of Railroad Trainmen is the designated representative of the plaintiffs within the meaning of the Railway Labor Act. The four plaintiffs who executed the counter-affidavit admit that the "officials of the B. of R. T. were then authorized to file a complaint with the National Railroad Adjustment Board" to enforce the provisions of Article 6 of the agreement of the defendant with its employees concerning rules, rates of pay and working conditions. With that authorization inheres the power to compromise.

The contentions made by the designated representatives of the employees in the complaint filed before the Adjustment Board on November 23, 1936, were not adverse to the plaintiffs. The contentions made prior to the compromise settlement executed by the Brotherhood officials on October 31, 1938, (defendant's Exhibit "C" attached to the affidavit filed in support of defendant's motion to dismiss) were not adverse to the plaintiffs. The contentions of the Brotherhood officials sought to benefit the plaintiffs in the case at bar. Any order entered by the Board finding that defendant had violated Article 6 of its agreement would have been a precedent for future orders of money claims.

79 The exhibits attached to the affidavit filed by the defendant in support of its motion to dismiss and incorporated by reference in its motion for summary judgment (Exhibits "A" to "F" inclusive) show collective bargaining with the General Committee of the Brotherhood of Railroad Trainmen, the designated representatives of the plaintiffs, during the period beginning in 1934 and ending in 1940. The affidavit of the four plaintiffs,

if given substantive legal effect, would require the defendant to cease collective bargaining.

81 That portion of Rule No. 3 quoted in Exhibit "A" attached to the plaintiffs' counter-affidavit does not apply to the compromise settlement executed by the Brotherhood officials on October 31, 1938. Clearly, it applies to an agreement relating to rules, rates of pay and working conditions. Such an agreement had been made in the case at bar. The plaintiffs predicate liability on an alleged violation of Article 6 of that agreement.

Rule No. 7 quoted in Exhibit "A" provides that the Grievance Committee "shall have power to alter, amend, add to or strike out * * * any part or all of any complaint or claim submitted to the committee * * * A general grievance committee may authorize their chairman to handle all grievances received from local lodges with the management for settlement. * * *" Such broad powers, granted to the Grievance Committee by Rule No. 7 permit the Committee to make an effective settlement of the dispute

82 regarding Article 6 in the case at bar. That settlement was executed by the Committee on October 31, 1938.

Rule No. 8½ quoted by the plaintiffs in Exhibit "A" attached to the counter-affidavit has no material relation to the case at bar. In like manner, general Rule No. 5, partially quoted in the same exhibit, has no material relation to the case at bar for the reason that the plaintiffs admit in their counter-affidavit that the officials of the Brotherhood "were then authorized to file a complaint" before the Board and to "enforce the terms" of Article 6.

The plaintiffs omitted to quote in Exhibit "A" attached to their counter-affidavit that portion of Rule No. 10 which provides:

"Whatever action may be taken by the general grievance committee * * * shall be law to the lodges on that road until the next meeting of the board of appeals, and if any member refuses to vote or abide by the action of such general grievance committee or board of adjustment he shall be expelled from the Brotherhood for violation of obligation."

The remainder of Rule No. 10 provides an appeal for any member of the Brotherhood who is not satisfied with the action of the Committee. Whatever action the plaintiffs in the case at bar may have for the alleged violation of rules of the Brotherhood should be taken before the various tribunals existing for that purpose created by the

Brotherhood of Railroad Trainmen. This Court lacks jurisdiction.

83 For the convenience of the Court there is attached hereto as defendant's Exhibit "G," a document which counsel for the defendant are informed and believe, and so state the fact to be, is a copy of the "Constitution and General Rules of the Brotherhood of Railroad Trainmen" amended 1931, and in force and effect at the time of the settlement agreement executed October 31, 1938. There is also attached hereto as defendant's Exhibit "H," a copy of the agreement between the defendant and its yardmen relating to rules and rates of pay, effective January 1, 1927, containing Article 6, for the alleged violation of which plaintiffs predicate liability.

The counter-affidavit of four of the twenty-three plaintiffs, in Paragraph 21 refers to an award made by the National Railroad Adjustment Board on September 6, 1940, Docket No. 6788, in the case of *Brotherhood of Locomotive Firemen and Enginemen* v. *Elgin, Joliet and Eastern Railway Company.* Obviously, that case refers

84 to a different "craft or class" than the Brotherhood of Railroad Trainmen. The counter-affidavit of the four plaintiffs (Paragraph 21) states "that the facts in their claim were identical with the facts under which the claim filed by C. H. Williams * * * ". The counter-affidavit seeks to impress the Court that the facts in the Brotherhood of Locomotive Firemen and Enginemen case decided by the Adjustment Board were the same as the facts in the Brotherhood of Railroad Trainmen case decided by the Adjustment Board. There is obvious error, if such was the intent.

In the Brotherhood of Locomotive Firemen and Enginemen case, Docket No. 6788 (Exhibit "B" attached to the plaintiff's counter-affidavit) there was no negotiated compromise agreement. There was no document similar to the negotiated compromise agreement in the case at bar executed by the officials of the Brotherhood on October 31, 1938.

85 IV.

REPLY TO PLAINTIFFS' MEMORANDUM BRIEF IN ANSWER TO DEFENDANT'S MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT.

The "Statement of Facts" in the plaintiffs' memorandum brief criticizes the statement of defendant that "the starting time of yard crews of the Standard Oil Company performing the work prior to July 27, 1934, were not the same as the starting times of yard crews of the defendant." This is clearly shown in the "Employees' Statement of Facts" in Docket No. 7324 of the National Railroad Adjustment Board, defendant's Exhibit "F" attached to the affidavit in support of the motion to dismiss.

In like manner, an agreement to waive Article 6 of the yardmen's agreement is admitted by the employees in the "Statement of Claim" and "Position of the Committee" in the same award (defendant's Exhibit "F").

The defendant admits that the complaint in Docket No. 7324, resulting in the award of the National Railroad
86 Adjustment Board of September 6, 1940, was filed before the Board on May 18, 1939, as stated in the last sentence of the affidavit attached to defendant's motion to dismiss.

The plaintiff's in their brief admit that, other than the three criticisms hereinabove answered in this reply in the three preceding paragraphs, the defendant's "statement of facts is correct insofar as it goes."

103 Wherefore, the defendant prays that its motion to dismiss may be granted and that judgment may be entered for the defendant.

Respectfully submitted,

Harry I. Allen,
Paul R. Conaghan,
Attorneys for defendant, Elgin, Joliet and Eastern Railway Company.

106 **Exhibit "I"**

Letterhead—National Railroad Adjustment Board—

May 18, 1939

Mr. S. M. Rogers, President
Elgin, Joliet & Eastern Railway Company
Chicago, Illinois

Mr. A. F. Whitney, President
Brotherhood of Railroad Trainmen
Cleveland, Ohio

Gentlemen:

Our Docket Numbers 7324 to 7328, inclusive, have been assigned as indicated to the following Elgin, Joliet & Eastern Railway Company—Trainmen's cases, which were submitted ex-parte at the instance of General Chairman Williams, representing the Brotherhood of Railroad Trainmen on that railroad:

7324—"Claim for one day's pay at time and one-half for each foreman and each helper * * * in violation of the fixed starting time provided for in Article 6 of the Yardmen's Agreement."

7325—"Claim of A. D. Fitch, Yardman, South Chicago Yard, for 155 days from February 14, 1938 to July 19, 1938, * * *"

7326—"Claim for one additional yard day at yard helper rate of pay for each of three (3) yardmen, * * * November 1, 1938 to February 7, 1939, inclusive. * * *"

7327—"Claim of Joe Grennes, Yardman, Gary Tin Plate Mill Yard for 14 days' pay at yard helper's rate, June 28, and 29, July 1, 5, 6, 7, 8, 9, 11, 12, 15, 17 and 18, 1938. * * *"

7328—"Claim for B. A. Smith, Foreman, S. F. Johnson and L. Clark, Helpers, * * * September 23, 1938. * * *"

These cases are assumed to be complete and nothing will be added thereto prior to the date of hearing thereon. It should be understood, however, that any argument presented to the Division at the hearing will be confined to

matters incorporated in the submissions, and introduction of evidence at the hearing is foreclosed.

If argument is prepared in form of written brief, copies thereof shall be exchanged between the parties prior to the date of hearing.

107 At the direction of the Division I am sending to the Management copies of the Employees submissions, and to the general Chairman copies of the Management's submissions. This is being done in order that both parties may have an opportunity to study the submissions prior to the date set for hearing.

Yours very truly,
T. S. MacFarland,
Secretary.

TSM:WB
cc:Mr. C. H. Williams

(Letterhead of National Railroad Adjustment Board.)

April 19, 1939.

Mr. S. M. Rogers, President,
Elgin, Joliet & Eastern Railway Company,
208 South La Salle Street,
Chicago, Illinois.

Dear Sir:

In letter of April 18, 1939, Mr. C. H. Williams, General Chairman representing the Brotherhood of Railroad Trainmen on your railroad, served notice of his intention to file ex parte submissions in the five claims which are fully explained under the headings "Statement of Claim," in his letter, a copy of which it is indicated was sent to you.

You are requested in accordance with Circular No. 1 of October 10, 1934, to file by May 19, 1939, fifteen copies of the Management's submissions in these five (5) ex parte cases.

It is assumed that the statements of claim shown in the submissions of both the Management and the Committee will be identical with those shown in the notice letter; and that as provided in Circular No 1 the submissions from both the Carrier and Committee will affirmatively show that all data submitted in support of their respective

positions has been presented each to the other and made a part of the particular question in dispute.

Very truly yours,
T. S. McFarland,
Secretary.

Endorsed: Chicago President's Office Apr 20, 1939. Railway Company, Elgin, Joliet & Eastern.
TSM/ms
cc: Mr. A. F. Whitney
Mr. S. H. Williams

109 (Letterhead of General Grievance Committee.)

April 18, 1939.

Mr. T. S. McFarland, Secretary,
National Railroad Adjustment Board,
1908 Consumers Building, 220 South State Street,
Chicago, Illinois.

Dear Sir:

Acknowledging receipt of your letter of the 17th calling my attention to an error in notification to the carrier in my offer of submissions to your Board, I am rewriting the letter of notice to conform to the submissions in each case and sending a copy of this letter to carrier.

Statement of Claim: Claim for one day's pay at time and one-half for each foreman and each helper for each day they were required to work in yard service in the Whiting (Standard Oil Company) Yard, in violation of the fixed starting time provided for in Article No. 6 of the Yardmen's Agreement of the Elgin, Joliet & Eastern Railway Company, effective January 1, 1927, and applicable to Whiting (Standard Oil Company) Yardmen, July 27, 1934, from dates of August 27, 1934, until November 14, 1938, inclusive.

Note: Claim made thirty (30) days after agreement was made effective on account of committees agreeing to permit this length of time for yardmen to become accustomed to the changes being made.

Statement of Claim: Claim of A. D. Fitch, Yardman, South Chicago Yard, for 155 days from February 14, 1938, until July 19, 1938, inclusive, on account of being cut off of the board and the Elgin, Joliet & Eastern Railway

Company retaining in the service during that time, a junior yardman.

Statement of Claim: Claim for one additional yard day at yard helper rate of pay for each of three (3) yardmen, assigned as "special switchmen" in Gary Mill Yard to hot cinder crew assignments, from date of November 1, 1938 until February 7, 1939, inclusive, account of requirilng each yardman so assigned to work on more than one assignment during his eight (8) hour tour of duty each day between and including those dates.

110 Claim for one day at yard helper rate of pay for three extra yardmen who stood first out each day from November 1, 1938 until February 7, 1939, inclusive, who were deprived of work on account of the carrier failing to assign yardmen to the vacant assignments instead of requiring the "special switchmen" to work on more than one assignment.

Statement of Claim: Claim of Joe Grennes, Yardman, Gary Tin Plate Mill Yard for 14 days pay at yard helper's rate, June 28th, and 29th, July 1st, 5th, 6th, 7th, 8th, 9th, 11th, 12th, 15th, 16th, 17th, and 18th, 1938, on account of using Mr. M. R. Joyce, General Yardmaster, Kirk Yard, in addition to his own duties, to fill the place of Mr. W. R. Brown, Assistant General Yardmaster, Gary Tin Plate Mill Yard, who was off on his annual vacation.

Statement of Claim: Time claim for B. A. Smith, Foreman, S. F. Johnson and L. Clark, Helpers, Whiting Yard, for one yard day at yard rate of pay account of being required to go from their yard in the Whiting (Standard Oil Company) Company plant into the B. & O. C. T. Railway classification yard for a car on date of September 23, 1938.

Oral hearing desired.

Yours truly,
C. H. Williams,
General Chairman, B. of R. T. E. J. & E. System.

copy to:
Mr. S. M. Rogers, President,
E. J. & E. Railway Company,
208 South LaSalle Street,
Chicago, Illinois.

123 And on, to wit, the 19th day of June, 1941, there was filed in the Clerk's office of said Court a certain Report of Proceedings, in words and figures following, to wit:

124 * * (Caption—2341) * *

Report of Proceedings at the hearing of the above entitled case, before the Honorable John P. Barnes, Judge of said court, on the 10th day of February, A. D. 1941.

Present:

Mr. John H. Gately, appeared for plaintiffs;

Messrs. Knapp, Allen & Cushing, by Mr. Paul R. Conaghan, appeared for defendant.

Mr. Gately: If your Honor please, I doubt if your Honor has had the time to read all of the cases that were cited in the short time that the briefs have been on file.

The Court: I read all the parts of those cases quoted in your briefs.

125 Mr. Gately: There were certain parts in some of the cases that were not quoted; for instance, the Rennsler case of Iowa, which was too long for quotation, and, as I suggested in my brief, if your Honor wishes a complete summary of the whole question of labor and carrier insofar as railroad employees are concerned, I think it is very well set forth in that case.

But getting down to the present case, if your Honor please, as I suggested in the brief, if you will look at the letter that they seem to wish to hang their hat on, as I might say, in this case, the letter sets up fundamentally certain claims—I believe there are sixty-one of them, claims and grievances. Now we distinguish between claims and grievances, claims being claims for money due and owing to the employees, and grievances being the failure of the railroad to live up to the terms of its agreement or its contract.

Now the grievance that was presented, and upon which they seek to have this letter act as a release was the only thing that was pending before the National Railroad Adjustment Board at that time, and from the wording of

126 the letter, if your Honor please, I believe your Honor will agree that it would be claims that they seek to have a release given on, so loosely set up by the—

The Court: I thought that letter was quite full and complete, and so did the mediation board, or whatever it calls itself.

Mr. Gately: Well, if your Honor please, that letter, if analyzed, only releases the grievance of the—well, let's get the letter, if your Honor please. The case involved here is case No. 5 set up in the letter, and sets out the starting time of switch engines in the Whiting Standard Oil Yard. There is nothing mentioned in that letter as to any individual members' claims, or any individual's claim of any of the plaintiffs before your Honor. Now that goes back to the last paragraph by setting up all these claims and grievances.

"The settlements proposed are predicated on a complete settlement and withdrawal of all cases now pending—"

Well, the only case pending was the grievance, if your Honor please.

"—either before the board, or under discussion with this office—"

127 Now we can only take words at their ordinarily accepted meaning. I wish to submit that that was the only thing that was pending, the failure of the railroad to live up to the terms of that agreement.

Now counsel devoted some time in his brief to the motion to dismiss. I set up in my reply brief that I would consider his motion to dismiss a motion for a summary judgment, and therefore urge no argument on it. Counsel devoted four or five pages to arguing the question.

He also sets up that there are no issues of fact. I believe if your Honor will read over the brief carefully, I believe I suggested six separate issues of fact. He seeks to slide over them by stating that they are not material. I think every one of those issues of fact set up there are very material. They go right to the heart of this lawsuit. He stated that we do not cite any facts. We cite all the facts set forth. Now, if your Honor looks at the brief you will see I said "We believe that the facts set forth plus the affidavit of facts filed herein completely set forth the issues." He seems to want to ignore the facts set up in the affidavit.

128 Now on this motion, the question as submitted to the Court is not a matter of law insofar as the legal principles alone are concerned. The question before this Court is set out in *Gordetsky* v. *Shell* in the Circuit Court

of Appeals, 101 Fed. 2nd, 760, in an action for malicious prosecution, where the plaintiff's affidavit directly controverts defendant's affidavit and supports the allegations of the complaint, it is error for the Court to dismiss the complaint. I wish to submit, if your Honor please, that the affidavit that is filed herein as the counter-affidavit to the plaintiffs' directly and unquestionably controvert the allegations of fact they set up there, and creates, if your Honor please, issues of fact diametrically opposed, by our affidavit and their affidavit, that can only be tried by a jury.

The Court: What is the first one?

Mr. Gately: The first fact, if your Honor please, is whether or not there was any authority in Mr. Williams to present any claim—

The Court: Oh, well, I think, as counsel said, it is ostensible authority. I think they are right about that.

Mr. Gately: If your Honor please, you can't dis-
129 regard all the cases we have quoted here. A union official cannot—and I have quoted, I believe, eight or ten cases which hold directly that union officials cannot waive the individual rights of its members. Now counsel seeks to evade that by stating that those cases were decided prior to the Act in 1934. Now, if your Honor please, the Act of 1934 was an amendment and there is no substantial change as to any of the acts. Furthermore, the United States Circuit Court of Appeals in I. C. R. R. Co. *vs.* Moore quoted several of those cases that I have cited. Now we can't disregard all the courts of the land, and every court in this land, with the exception of the Smith case, if your Honor please, has decided unequivocally down through the whole history of the labor movement that a union official cannot waive the individual rights of its members.

Now, if your Honor please, I think it is very adeptly stated in the Stephenson case, if your Honor please, what could be the result—that isn't the case. There is one case that cited in effect what would be the result if the individual members of a union—in an agreement between the union and the carrier the indivdual rights would
130 be caught between the millstones, and every individual's rights could be trampled on and waived entirely.

Now all of these cases that I have cited, if your Honor please, were under the Act, the Railway Labor Act of 1926—

The Court: What do you think would have happened had the ruling of the National Railroad Adjustment Board of September 6, 1940, been the opposite of what it was?

Mr. Gately: Had it been the opposite and given an award to these employees I would still say that it was absolutely of no effect. However, I say also that the employees, had they been apprised of it, might have ratified it, but I still say it would have been void. That case was void absolutely without any reference to these employees and without any authority from these employees, if your Honor please, and Williams, the man who filed it, made the statement he took it upon himself to file that, and this carrier knew of that, if your Honor please.

If there is anything at all insofar as jurisdiction and the rights of parties is concerned, I think this is one of the most sublime cases in which it could be tried.

131 In other words, if your Honor please, suppose the members of the union—not the members but the officers of the union decided that they wanted to sell out these men, and they filed a claim that would absolutely abrogate a very vast amount of money that might become due under the terms of a contract, they did it without the knowledge of the members—well, if your Honor please, the Brotherhood of Railroad Trainmen have certain rules and regulations that have to be followed. And this defendant knew it. As a matter of fact, it knew it so well that it appended to its brief the constitution as an exhibit. Now the exhibits are all right here, your Honor. You have the constitution and the schedule, but I didn't think it was well to set up the whole blooming thing as an exhibit, if your Honor please, only the pertinent parts.

Now, then, the defendant knew of all these rules and regulations. They say "ostensible authority." Your Honor mentioned it. Now authority is either absolute or there is no authority. There is no ostensible authority. Either I have authority as an agent of you to go out and sell your house or I haven't authority.

132 The Court: Either you have the authority of your client to come in here or you haven't his authority.

Mr. Gately: Absolutely.

The Court: But whether you have or not, you still filed the claim.

Mr. Gately: If your Honor please, getting back to the railroad, where there are millions of dollars involved, some official of the Brotherhood goes off half cocked—

The Court: What I said was right. It may not apply to an officer of a labor union.

Mr. Gately: That is correct, if your Honor please, that is correct, but for that reason I think the Court should be very careful in giving cognizance to ostensible authority. They either have it or they haven't got it.

The Court: I think it is quite important that this right of this National Railway Adjustment Board be sustained. I think that is important. It is vitally important to your clients even when their interests are adversely affected.

Mr. Gately: Well, if your Honor please—

The Court: I am not claiming that we are starting to try the case over again, but I think it is quite important
133 to society that the authority of that National Railroad Adjustment Board be sustained.

Mr. Gately: I think it is except, if your Honor please, that the act under which they are operating is absolutely unconstitutional. There is no question of it, if your Honor please. It gives a right of review to the employer, but it gives no right of review to the employee, and that is a direct violation of the fifth amendment to the constitution, and your Honor knows it. If you rule the Railroad Adjustment Board's award is final, I have cited several cases to your Honor which show absolutely that the award is not final. There is another question as to the finality of the award in the act itself if the award concerns a money award.

Now counsel takes exception to my statement that that award contained a money award. I submit, if your Honor please, had the award been granted it would have contained a money award, because as it was presented it concerned a money award. Now, under the act itself that isn't a final award.

Counsel also stated in the brief, if your Honor please, that these employees would have no right under the National Railway Labor Act—and he points it out specifi-
134 cally in two instances in his brief—to deal individually with their employer. I would like to call your Honor's attention to the act itself, which states, title 45, paragraph 152, the fourth subdivision thereof, page 221 of the United States Code:

"Provided that nothing in this chapter shall be construed to prohibit a carrier from conferring with employees individually, or local representatives of employees from conferring with the management."

Now, if your Honor please, that is not as far as we attorneys should go, I believe, in quoting law or quoting statements to the Court, and I suggest that counsel has omitted to read the act. Now this Board and the Brotherhood of Railroad Trainmen are not all powerful. They can't utterly disregard the rights of human beings, individuals, if you will. We are still a democracy, I hope, and, if your Honor please, there are the various cases that have been decided by many courts in this land throughout the country from California down through the Southern States up to Maine, where all of the courts have held that the labor union cannot, must not waive the individual rights of
135 its members; and to give effect to this letter, even if the officials had been authorized to enter into this consent, so-called, or complaint, or proceedings, whatever you call it, before the Board, I would say that he had no right to waive without conferring with every member.

If your Honor please, I might cite this as an example: Suppose an attorney had an opportunity to compromise in a case, and he individually took it upon himself to settle that case. What would your Honor say? He might have the authority under his contract of employment to settle it, but it certainly would be bad policy, and I think he would be severely criticized by the Bar Association and by his fellow attorneys. But here, if your Honor please, the Brotherhood has set up specific rules where there is a compromise. Counsel set up one provision of that exhibit, but I didn't go into the rest of the exhibits because it isn't material; that is, that a committee, not an individual, must waive or compromise any claim.

Now in this case, if your Honor please, the letter of October 28th was signed by C. H. Williams and Mr. S. F. Johnson, I believe the name is. That is not the entire
136 committee. The committee consists of the general chairman, the general secretary and the local chairman. The local chairman had no knowledge of this letter, and I think it is significant.

Now under the rules—and they knew the rules—they say he had ostensible authority. Well, the authority he had was nothing. Only the general committee had authority and the general committee did not sign this letter. Now if your Honor will look you will see there are three members on that committee, and only three have authority to make any compromise.

I don't think there is anything more to say that I haven't

said in the brief, if your Honor please, except as to the cases cited. Incidentally, several of those cases were not decided before the Act of 1934, as counsel stated, and I again wish to call your attention to the fact that the Act of 1926 is the National Railway Labor Act, and the amendments made in 1934 did not change any substantive rights or liabilities or principles under the old Act. The only thing the new Act did, if your Honor please, was to set up a different personnel. Under the old Act the award of the Board was final; there was no provision at all for review. Under
137 the new Act a right of review is given to the carrier but not to the employees.

Now, if your Honor please, counsel has entirely evaded the constitutionality of this act, and I didn't want your Honor to be burdened with the matter of passing on its constitutionality unless it was necessary. Now if you will notice in my brief, your Honor, I state that in the event the Court feels the award is final—and under the cited decisions I cannot see how your Honor can—but in the event you do feel that the award is final, then I may urgently wish you to consider the constitutionality of this act. Under the provisions of the act, as your Honor is aware, if an award is granted and the carrier doesn't see fit to carry it out after an order has been entered thereunder, the petitioner may appear before the United States District Court here and seek to have it enforced. That appearance or that trial before the Court is a trial de novo opening up the whole case, and the carrier can put in any defenses. He says the award of the Board is termed only prima facie evidence, and under the procedure I submit, if your Honor please, the carrier is the only one entitled to a review. A de-
138 feated employee, as many of these cases hold that I have cited to your Honor, cannot thereby appeal, and there are two or three cases that don't come out directly—the Des Moines case states by inference where the employer has questioned the constitutionality of this act the Court said: "You are certainly not aggrieved. If anyone is aggrieved it is the employee."

I think that is all, if your Honor please.

The Court: If I remember correctly, there was a motion to dismiss and also a motion for summary judgment, is that correct?

Mr. Conaghan: Yes, sir.

Mr. Gately: If your Honor please, under the law a motion to dismiss with affidavits attached should be con-

sidered as a motion for summary judgment, and that is the way I stated in my brief I would consider it, and I think your Honor has read the brief.

The Court: Am I correct in my understanding of the complaint that these various switchmen seek a day and a half pay for every day that they are required to start other than at the time—

Mr. Gately: That is correct, Judge.

The Court: Am I correct in my understanding that that they were paid for the time they actually worked?

139 Mr. Gately: That is correct. Under their agreement, if your Honor has the agreement, that penalty is attached.

The Court: Where is that penalty? I couldn't find it.

Mr. Gately: If your Honor please, I was incorrect in that statement, the schedule itself does not set that forth, but it is the universal custom among railroads throughout the United States that on any overtime—I think I set it up in the complaint—that is the penalty.

Decision.

The Court: In this case it appears that some employees of the Elgin, Joliet & Eastern Railway Company, which employees were members of the Brotherhood of Railroad Trainmen, had a controversy in respect of the starting times of yard crews in the Whiting Standard Oil Yard of the Elgin, Joliet & Eastern Railway Company; that that controversy was presented to the National Railroad Adjustment Board by Mr. C. H. Williams, general chairman of some unit of the Railway Trainmen of the Brother-

140 hood of Railway Trainmen: that subsequently a Mr. Rogers, who was president of the Elgin, Joliet & Eastern Railway Company, addressed a letter to Mr. Williams as general chairman of the Brotherhood of Railway Trainmen, which letter related to the compromise settlement of a large number of controversies pending between the Brotherhood and the Elgin, Joliet & Eastern Railroad Company. One of those matters was case No. 5, Labor Board Docket 3537, starting time of switch engines in Whiting Standard Oil Yard. That letter says:

"Settled by agreement that the starting times, for a ninety day trial period commencing November 15th, 1938, shall be the times provided for in Article 6 of the Yard-

men's Agreement instead of the starting time heretofore agreed upon and now being followed. If at the end of the ninety day trial period the Railway Company or its employees claim that the starting times as fixed in Article 6 do not result in efficient and economical operation and in satisfaction to our employees and to the industry served, then representatives of the Railway Company and representatives of the Yardmen, and representatives of the
141 Engineers and representatives of the Firemen will sit down and work out a schedule of starting time best suited for meeting the special requirements of the industry."

The last paragraph of that letter says:

"We have by this letter given you a complete resume of all of the claims which have not heretofore been disposed of, filed by you on behalf of the employees whom you represent and have proposed in this letter a very liberal disposition of all the cases involved. The settlements proposed are predicated on a complete settlement and withdrawal of all cases now pending either before the board, or under discussion with this office except Case No. 4, which it is understood will be left to a decision by the National Railroad Adjustment Board, and it is further understood that in the event these settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement."

That letter is signed by Mr. Rogers as president, is dated October 28, 1938, and below Mr. Rogers' signature appears "Accepted for the Yardmen: October 31, 1938,
142 C. H. Williams, General Chairman, B. of R. T. S. F. Johnson, Secretary, B. of R. T."

Subsequently the Brotherhood of Railway Trainmen filed another claim with the National Railway Adjustment Board, First Division. The claim says:

Claim for one day's pay at time and one-half for each foreman and each helper for each day they were required to work in yard service in the Whiting (Standard Oil Company) Yard, in violation of the fixed starting time provided for in Article No. 6 of the Yardmen's Agreement of the Elgin, Joliet and Eastern Railway Company, effective January 1, 1927, and applicable to Whiting (Standard Oil Company) Yardmen, July 27, 1934, from dates of August 27, 1934, until November 14, 1938, inclusive."

Now in that matter the board makes reference to this letter from which I have quoted and made the following findings—this is under date of the 6th day of September, 1940:

"Findings: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and
143 employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"The evidence shows that the parties to the agreement disposed of the claim here made by the letter of carrier dated October 28th, 1938, accepted by employees October 31, 1938.

Award

"Claim denied per Findings.

National Railroad Adjustment Board
By Order of First Division."

Subsequently the employees filed this suit. There is this question of jurisdiction. The allegation of the complaint is, as I recall, that about half of the—

Mr. Gately: Plaintiffs are residents of Indiana. That is correct, Judge.

The Court: That more than half of the plaintiffs herein are residents of the State of Indiana, and the defendant herein is a corporation created under the laws of the
144 State of Illinois. I take it that if these plaintiffs have claims, each one has a claim, and that there would remain a cause of action and a suit having parties of diverse citizenship even if we caused part of them to be dismissed out, so I am spending no more time on that question.

The great question in the case is as to whether or not this decision of the National Railroad Adjustment Board, Division 1, is an adjudication of the matter as between the parties. On behalf of the plaintiffs it is contended that it is not such an adjudication. On behalf of the defendant it is contended that it is an adjudication. On behalf of the defendant it is said that these proceedings before the Board

were a very good example and a typical example of collective bargaining, and that the result of collective bargaining proceedings should be binding on all parties if they are represented. Certainly the Brotherhood undertook to represent these plaintiffs in that proceeding before the Board. There was no adverse relationship between the Brotherhood and these plaintiffs in that proceeding before the Board, and I think that the controversy was submitted to the Board, that it had jurisdiction and that it
145 was decided, and that the plaintiffs were represented there and are bound thereby. That is the big question, however, in the case.

I assume this case will go up, and I will be glad to have it go up. I think the ruling of the Adjustment Board was binding upon the plaintiffs as well as upon the defendant, and that it is binding on this court in this proceeding.

There is one other question in the case. Paragraph 8 of the complaint says that under the terms of the agreement aforesaid each of the plaintiffs herein is entitled to pay for an additional day at time and a half at the regular daily rate from August 26, 1934, to and including November 14, 1938, for each foreman and each helper for each day that they were required to work in yard service in the Whiting yard of defendant, in accordance with the established practice among the railroad and employees thereof, and as provided for in Article 6 of said agreement aforesaid. Now there is no such provision in Article 6 of the agreement. I couldn't find it any place therein.

The situation there would be very much like the situation in the dim distant past when I was working as a law
146 clerk. If I had arranged when I started to work that I was to come to work every morning at 9 o'clock and have one hour off for lunch and quit work at 5 o'clock, and if some time, two years after or some short time after I started to work my employer should say "Well, hereafter I am going to ask you to come in at 8:30 and you may go home at 4:30", and I had acquiesced and been paid my wages for two years, then after two years I should say to my employer, "Well, I had an agreement with you that I was to start work at 9 o'clock and you have violated that agreement and I want time and a half for each one of those days"—now I not only couldn't under that state of facts have recovered the time and a half for each one of those days, but I couldn't have recovered anything because I ac-

quiesced. On the facts as I have assumed them I don't think—

Mr. Gately: The men did not acquiesce, if your Honor please. They complained immediately.

The Court: Well, even if they did complain all they could get would be their damages, and what would be their damages? It would probably be one of those measurable in one cent damages and costs.

The motion for summary judgment will be granted.

147 Counsel may present findings of fact and conclusions of law and a judgment order not inconsistent with what the Court has stated.

Mr. Gately: How much time will I have on that, your Honor?

The Court: How much time what?

Mr. Gately: How much time will I have to present that? I would like to get an appeal bond.

The Court: The burden is on the defendant to do that.

Mr. Gately: Well at that time you will set the appeal bond?

The Court: Oh, that will be a nominal cost bond.

Mr. Gately: All right, Judge, thank you.

148 Filed Jun 19 1941. At 3:10 o'clock P. M. Hoyt King, Clerk.

ered 20, 1941. 111 And afterwards, to wit, on the 20th day of February, A. D. 1941, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit: Summary Judgment:

112 In the District Court of the United States.

* * (Caption—2341) * *

SUMMARY JUDGMENT.

The motion of the defendant in the foregoing entitled case for summary judgment for the defendant and against the plaintiffs, pursuant to Rule 56 (c) of the Rules of Civil Procedure, having been presented, and the Court having considered the pleadings, affidavits, exhibits, admissions and briefs filed by counsel for the plaintiffs and

the defendant, and having heard the oral argument of counsel for the plaintiffs and the defendant upon the whole case, and having considered said motion for summary judgment for the defendant and being fully advised in the premises:

The Court hereby finds that the defendant herein is entitled to a summary judgment as a matter of law.

It Is Hereby Ordered, Adjudged And Decreed that the defendant's motion for summary judgment be, and the same hereby is, granted, that the plaintiffs herein do have and recover nothing by their suit, that the defendant, Elgin, Joliet and Eastern Railway Company, go hence without day, and that the said defendant do have and recover of and from the plaintiffs its costs and charges in this behalf expended and have execution therefor.

Enter:

Barnes,
Judge.

Dated: February 20, 1941.

113 And on, to wit, the 17th day of May, 1941, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Notice of Appeal in words and figures following, to wit: Filed May 1941.

114 In the District Court of the United States

For the Northern District of Illinois,

Eastern Division.

Harry M. Alderman, *et al.*, *Plaintiffs*, *vs.* Elgin, Joliet and Eastern Railway Company, an Illinois corporation, *Defendants.*	Civil Action No. 2341.

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS UNDER RULE 73(b).

Notice Is Hereby Given that Plaintiffs Harry M. Alderman, F. E. Beccue, G. W. Burley, J. E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. J. Jones, P. F.

McNamara, R. L. Miller, T. J. Murray, J. C. Newman, Edward R. Nolan, H. A. Schroeder, B. F. Smith, M. F. Starkweather, L. Strodtbeck, Ernest Thompson, and Malcolm H. Young, hereby appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the order entered on February 20, A. D. 1941, as follows:

"It is hereby ordered, adjudged and decreed that the defendants' motion for summary judgment be, and the same hereby is, granted, that the plaintiffs herein do have and recover nothing by their suit, that the defendant, Elgin, Joliet and Eastern Railway Company, go hence without day, and that the said defendant do have and recover of and from the plaintiffs its costs and charges in this behalf expended and have execution therefor."

John H. Gately,
Attorney for Appellants Harry M. Alderman, F. E. Beccue, G. W. Burley, J. E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. M. McNamara, R. L. Miller, T. J. Murray, J. C. Newman, Edward R. Nolan, H. A. Schroeder, B. F. Smith, M. F. Starkweather, L. Strodtbeck, Ernest Thompson, and Malcolm H. Young,
134 S. LaSalle Street,
(Telephone: Franklin 4546)

Filed May 17, 1941.

117 And on, to wit, the 17th day of May, 1941, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Notice of Filing of Notice of Appeal in words and figures following, to wit:

118 UNITED STATES CIRCUIT COURT OF APPEALS.

• • (Caption—2341) • •

NOTICE OF FILING OF NOTICE OF APPEAL.

To: Messrs. Knapp, Allen and Cushing,
208 South LaSalle Street, Chicago:

You are hereby notified that the plaintiffs-appellants have this 16th day of May, A. D. 1941, filed their Notice of Appeal in the above entitled cause, a copy of which notice of appeal is hereto attached and served upon you.

John H. Gately,
John H. Gately,
Attorney for Plaintiffs-Appellants.

Received a copy of the above notice of filing of notice of appeal, together with copy of Notice of Appeal therein referred to, this 16th day of May, A. D. 1941.

Knapp, Allen & Cushing,
Harry I. Allen,
Paul R. Conaghan.

121 And on, to wit, the 6th day of June, 1941, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Statement of Points in words and figures following, to wit: Filed June 6, 1941.

122 In the District Court of the United States.

* * (Caption—2341) * *

STATEMENT OF POINTS.

Plaintiffs-Appellants herewith present the points upon which they claim the court erred:

1. In denying the Plaintiffs' Motion to Strike the Defendants' Motion to Dismiss the complaint, said motion to dismiss containing pleas of res judicata and release.
2. In allowing the Motion of the Defendant for summary judgment.
3. In entering Judgment that the Plaintiffs take nothing by their complaint.
4. In denying the Plaintiffs' right to trial by jury of the issues of fact set up in the complaint; and the issues of fact improperly raised by the Defendants in their motion and affidavit, that is the plea of release therein contained.

Harry M. Alderman, et al.,
By: Gately and Walsh,
By: John H. Gately,
Their Attorneys.

Filed May 17, 1941.

115 And on, to wit, the 17th day of May, 1941, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Bond on Appeal in words and figures following, to wit:

116 **Bond of Appeal.**

Know All Men by These Presents: That we, Harry M. Alderman, F. E. Beccue, G. W. Burley, J. E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, T. J. Murray, J. C. Newman, Edward R. Nolan, B. F. Smith, H. A. Schroeder, M. F. Starkweather, L. Strodtbeck, Ernest Thompson, and Malcolm H. Young, as principals, are held and firmly bound unto Elgin, Joliet and Eastern Railway Company, a corporation, in the full and just sum of One Hundred Dollars ($100.00), to be paid to the said Elgin, Joliet and Eastern Railway Company, a corporation, its attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 15th day of May, in the year of our Lord one thousand nine hundred and forty-one.

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, Eastern Division, in a suit pending in said Court between Harry Alderman and others, plaintiffs, and Elgin, Joliet and Eastern Railway Company, a corporation, defendant, a decree was rendered against the said Harry Alderman and others, and the said Harry Alderman and others, having filed their notice of appeal in the United States Circuit Court of Appeals for the Seventh Circuit in the Clerk's Office of the District Court to reverse the decree of the aforesaid suit in the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago, within forty days from the date hereof.

Now, the condition of the above obligation is such, that if the said Harry Alderman and others, as listed above and subscribed hereto shall prosecute their said appeal to effect, and shall answer all costs that may be awarded against them if they fail to make their plea good, then the

above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the presence of:
John H. Gately,
Maurice J. Walsh.

Edward R. Nolan,	(Seal)	M. F. Starkweather,	(Seal)
Harry M. Alderman,	(Seal)	P. F. McNamara,	(Seal)
F. E. Beccue,	(Seal)	R. L. Miller,	(Seal)
G. W. Burley,	(Seal)	T. J. Murray,	(Seal)
J. E. Challender,	(Seal)	J. C. Newman,	(Seal)
W. R. Garvey,	(Seal)	B. F. Smith,	(Seal)
J. M. Harr,	(Seal)	H. A. Schroeder,	(Seal)
A. T. Hatfield,	(Seal)	L. Strodtbeck,	(Seal)
R. J. Jones,	(Seal)	Ernest Thompson,	(Seal)
by John H. Gately, *Attorney in Fact.*		Malcolm H. Young, by John H. Gately, *Attorney in Fact.*	(Seal)

Approved May 19, 1941.

Barnes,
Judge.

119 And afterwards, to wit, on the 19th day of May, 1941, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit: Entered May 19, 1941.

120 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—2341) * *

Monday, May 19, 1941.

Present: Hon. John P. Barnes, District Judge.

On motion of Plaintiffs' attorneys, It Is Ordered that the Appeal Bond heretofore filed May 17, A. D. 1941, be and the same is hereby approved.

149 And on, to wit, the 20th day of June, 1941, came the Plaintiffs-Appellants by their attorneys and filed in the Clerk's office of said Court their certain Motion in words and figures following, to wit:

Filed June 20, 1941. 150 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—2341) • •

MOTION TO EXCLUDE FROM THE RECORD A FROM DEFENDANT'S DESIGNATION OF AD TIONAL PORTIONS OF THE RECORD.

Now come the Plaintiffs herein, by John H. Gately, th Attorney, and move the Court to exclude from the rec in this case now being prepared for appeal by the Cl of this Court and from the Designation of Additional P tions of the Record filed by the Defendants:

1. Item "No. 1, Date Dec. 12, 1940 Motion to dismis etc., which is the same pleading as set up in appellan Designation of Record, in Item 4, Dec. 10, 1940.

2. The Document, "Item No. 2, Feb. 6, 1941 Mem randum of reply to

I. Planitiff's motion to strike.
II. Counter-affidavit of plaintiffs.
III. Plaintiff's answer relating to "Res Adjudicata Release" set forth in defendan's motions.
IV. Memorandum brief in answer to defendant's moti to dismiss and for summary judgment.

and Exhibits G to I, inclusive, attached thereto, filed w the Secretary of Honorable John P. Barnes, Judge of United States District Court."

151 for the reason that said document is not a pleadi but a brief and was not properly filed with the Cl as a pleading and has no place in the law record. T said document is not under oath and purports to cont Exhibits which purport to be copies of letters, but wh Exhibits are not shown to nor supported by affidavit, properly presented for consideration by the Court.

3. Item "No. 3, Feb. 10, 1941 Report of proceedi and opinion of the court on defendant's motion for su mary judgment," for there were no proceedings nor corded proceedings cognizable as a part of the record appeal; and to the knowledge of the Plaintiffs there w no written nor recorded opinion by the Court in this c other than the Order being appealed from, nor was s opinion filed with the Clerk of this Court.

Wherefore, your Plaintiffs pray that said items of d ignation by the Defendants herein as aforesaid will

excluded from the record on appeal herein and the Defendant's designation of additional portions of the record be stricken.

John H. Gately,
Attorney for Plaintiff.

152 And afterwards, to wit, on the 20th day of June, A. D. 1941, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit: Entered June 20, 1941.

153 In the District Court of the United States.
* * (Caption—2341) * *

ORDER.

This cause coming on to be heard upon the motion of the Plaintiffs herein to exclude from the record on appeal, and from the Defendant's designation of additional portions of the record, certain items set up in said motion, and it appearing to the court that said Defendants have agreed to exclude Item No. 1 of their designation of the additional portions of the record, and it appearing that all parties entitled thereto having received notice thereof and after a hearing thereon.

It Is Ordered that the motion of the plaintiffs to exclude Items numbered 2 and 3 of Defendant's designation of additional portions of the record is hereby overruled without prejudice.

Enter:

Barnes,
Judge.

154 And on, to wit, the 6th day of June, 1941, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Designation of Contents of Record on Appeal in words and figures following, to wit:

Filed June 6, 1941. 155 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—2341) * *

DESIGNATION OF CONTENTS OF RECORD OF APPEAL.

No. Date

1. Nov. 19, 1940. Complaint.
2. Nov. 19, 1940 Summons.
3. Nov. 19, 1940. Security for costs.
4. Dec. 10, 1940. Motion of defendant to dismiss and affidavit in support.
5. Dec. 24, 1940. Notice and motion to strike defendant's motion to dismiss.
6. Dec. 24, 1940. Order on motion of plaintiff to strike.
7. Jan. 13, 1941. Motion for summary judgment.
8. Jan. 29, 1941. Reply to motion setting up pleas of *res adjudicata* and release on a motion for a summary judgment.
9. Jan. 29, 1941. Counter affidavit to affidavit in support of motion to dismiss.
10. Feb. 20, 1941. Order summary judgment of dismissal of complaint.
11. May 17, 1941. Notice of appeal to United States Circuit Court of Appeals.
12. May 17, 1941. Bond on appeal.
13. May 17, 1941. Notice of filing notice of appeal.

156 14. May 19, 1941. Order appeal bond heretofore filed herein May 17, 1941 approved.

15. June 6, 1941. Statement of Points.

John H. Gately,
Maurice J. Walsh,
Attorney for Appellants,
134 S. LaSalle Street, Chicago
Telephone: Franklin 4546.

Received a copy of the foregoing Designation of Contents of Record on Appeal this 6th day of June. A. D. 1941.

Knapp, Allen and Cushing,
Attorneys for Appellee.

157 And on, to wit, the 13th day of June, 1941, came the Defendant-Appellee by its attorneys and filed in the Clerk's office of said Court its certain Designation of Additional Portions of Record in words and figures following, to wit: Filed June 13, 1941.

158 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—2341) * *

DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE INCLUDED IN RECORD ON APPEAL.

No. Date

1. Dec. 10, 1940. Motion to dismiss, affidavit in support of motion to dismiss, Exhibits A to F, inclusive, attached to the affidavit in support of motion to dismiss.
2. Feb. 6, 1941. Memorandum of reply to
I. Plaintiffs' motion to strike.
II. Counter-affidavit of plaintiffs.
II. Plaintiffs' answer relating to "Res Adjudicata and Release" set forth in defendant's motions.
IV. Memorandum brief in answer to defendant's motions to dismiss and for summary judgment.
and Exhibits G to I, inclusive, attached thereto, filed with the Secretary of Honorable John P. Barnes, Judge of the United States District Court.
3. Feb. 10, 1941. Report of proceedings and opinion of the court on defendant's motion for summary judgment.

Harry I. Allen,
Paul R. Conaghan,
Attorneys for Elgin, Joliet and Eastern Railway Company, Appellee.
208 S. LaSalle Street,
Chicago, Illinois.
Telephone: State 0300.

159 Received a copy of the foregoing designation of additional portions of the record, proceedings and

evidence to be included in record on appeal this 13th day of June, 1941.

John H. Gately,
Attorney for Appellants.

Filed June 20, 1941.

160 And on, to wit, the 20th day of June, 1941, came the Plaintiffs-Appellants by their attorneys and filed in the Clerk's office of said Court their certain Amended Designation of Contents of Record on Appeal in words and figures following, to wit:

161 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—2341) * *

AMENDED DESIGNATION OF CONTENTS OF RECORD OF APPEAL.

By leave of Court first had and obtained, Plaintiffs-Appellants herein file this as their amendment to the Designation of Contents of Record on Appeal:

No.	Date.	
16.	June 20, 1941.	Motion to Exclude from the Record.
17.	June 20, 1941.	Order Denying Motion.

John H. Gately,
Maurice J. Walsh,
Attorney for Appellants,
134 S. LaSalle Street, Chicago
Telephone: Franklin 4546.

Received a copy of the foregoing Amended Designation of Contents of Record on Appeal this 20th day of June, A. D. 1941.

Harry I. Allen and
Paul R. Conaghan,
Attorneys for Appellee.

1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable John P. Barnes, District Judge of the United States for the Northern District of Illinois on thirteenth day of November, in the year of our Lord one thousand nine hundred and forty-two, being one of the days of the regular November Term of said Court, begun Monday, the 2nd day of November, and of our Independence the 167th year.

Present:

Honorable John P. Barnes.
William H. McDonnell, U. S. Marshal.
Roy H. Johnson, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois,

Eastern Division.

G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith and M. H. Young,

vs.

Elgin, Joliet and Eastern Railway Company, a corporation.

No. 2341.

Be It Remembered, that the following petition was filed in the above-entitled cause in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 2nd day of November, 1942.

Filed Nov. 2, 1942.

3 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—2341) • •

PETITION.

Now come the plaintiffs herein, G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. J. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith, and M. H. Young, by John H. Gately, their attorney, and respectfully submits to the Court that heretofore on, to-wit, the 10th day of February, A. D. 1942, the United States Circuit Court of Appeals for the Seventh Circuit rendered a decision in the above-entitled cause, wherein the judgment heretofore rendered herein was reversed, and directions issued to proceed in accordance with said opinion, which suggested that certain amendments should be made to the pleadings filed herein.

Your petitioners further respectfully state that a mandate from the United States Circuit Court of Appeals has been duly filed herein.

Your petitioners pray that they may be allowed to amend said Complaint by substituting in lieu of Paragraph 1 thereof, the attached amendment, and in lieu of Paragraph 9 thereof, the attached amendment, which said amendments shall amend all of the pleadings filed herein, and briefs, abstracts, and memoranda filed of record in the United States Circuit Court of Appeals.

4 Petitioners further pray that this Honorable Court will render a decision on the amended Complaint, and that the Motion and Counter-motion and all other pleadings filed subsequent to said original Complaint, may stand as Motions and Counter-motions to the Complaint as amended; that the Court may render its decision thereon, and that an appeal may be granted forthwith on the said Amended Complaint and decision thereunder, and that the Clerk of this Court may be instructed to certify said amendments to the United States Circuit Court of Appeals for the 7th Circuit; that the record heretofore certified may stand with said amendments so added.

And Your Petitioners Will Ever Pray.

G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith, M. H. Young,
By John H. Gately,
By John H. Gately,
134 S. LaSalle Street,
Franklin 4546.

State of Illinois } ss.
County of Cook }

John H. Gately, being first duly sworn, on oath deposes and says that he is the attorney for the plaintiffs-appellants in the above-entitled cause; that he has read the Petition, by him subscribed, knows the contents thereof, and believes the same to be true in substance and in fact.

John H. Gately.

Subscribed and Sworn to before me this 26th day of October, A. D. 1942.

Herman Herson,
Notary Public.

(Seal)

5 Amendments to the Complaint.

Amendment to Paragraph 1:

The plaintiffs herein, G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith, and M. H. Young, are all residents of the State of Indiana, and the defendant herein is a corporation incorporated under the laws of Illinois; and that the matters in controversy exceed, exclusive of interest and costs, the sum of $3,000.00.

Amendment to Paragraph 9:

That by reason of the violation of said agreement as aforesaid by the defendant, the approximate following amounts with interest thereon at five per cent (5%) per annum from the date due until paid, are owed plaintiffs by defendant, as follows:

G. W. Burley	$ 7,000.00
James E. Challender	4,500.00
W. R. Garvey	14,000.00
J. M. Harr	3,500.00
A. T. Hatfield	7,000.00
R. P. Jones	6,974.00
P. F. McNamara	4,800.00
R. L. Miller	7,000.00
B. F. Smith	7,000.00
M. H. Young	3,500.00

6 And afterwards, to wit, on the 13th day of November, A. D. 1942, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge appears the following entry, to wit:

7 IN THE DISTRICT COURT OF THE UNITED STATES. Entered Nov. 13, 1942.
* * (Caption—2341) * *

ORDER.

This cause coming on to be heard upon the Petition of G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith, and M. H. Young, by John H. Gately, their attorney, and it appearing to the Court that a decision was heretofore rendered by the United States Circuit Court of Appeals for the Seventh Circuit, on the 10th day of February, A. D. 1942, remanding the above entitled cause to this Court for the purposes of amendment, and upon Stipulation of the parties that the decision presented this day before the Court was the decision of the United States Circuit Court of Appeals for the Seventh Circuit, and it appearing in said Petition that said plaintiffs desire to amend said Complaint filed herein, by deleting therefrom certain parties who were residents of Illinois, and amending the ad damnum for certain parties plaintiff; that said amendments shall be considered as amendments to all pleadings filed herein, and that the motions and counter-motions filed to the original Complaint filed herein shall stand as motions and counter-motions to the Complaint as amended, and the evidence adduced and the arguments presented to said original Complaint shall stand
8 as evidence and arguments to the Complaint as amended and all motions and counter-motions, and it appearing that plaintiffs and defendant are represented in Court by counsel;

It is Hereby Ordered, Adjudged and Decreed that the amendments set forth in said Petition filed herein be, and the same are hereby allowed to be filed to the original Complaint as amended herein, and are to be considered as amendments to all pleadings in said cause; and

It Is Further Ordered that all motions and counter-motions filed herein to said Complaint may stand as motions and counter-motions to said Complaint as amended; and

It is Further Ordered that the evidence, affidavits and points of law presented with reference to the original Complaint shall stand as the evidence, affidavits and points

of law to the said Complaint as amended and all motions and counter-motions; and

It Is Further Ordered that said cause is now standing at issue upon the Complaint as amended and the motions and counter-motions, with affidavits attached and admissions made by counsel in open Court, and upon the motion of the defendant to dismiss the Complaint; and

The motion of the defendant in the foregoing entitled case for summary judgment for the defendant and against the plaintiffs, pursuant to Rule 56 (c) of the Rules of Civil Procedure, having been presented, and the Court having considered the pleadings, affidavits, exhibits, admissions and briefs filed by counsel for the plaintiffs and the defendant, and having heard the oral argument of counsel for the plaintiffs and the defendant upon the whole case, and having considered said motions to dismiss and for summary judgment for the defendant and being fully advised in the premises:

9 The Court has reconsidered its opinion as expressed in the report of proceedings in this case on the 10th day of February, 1941, and hereby affirms its opinion.

The Court hereby finds that the defendant herein is entitled to a summary judgment as a matter of law.

It Is Hereby Ordered, Adjudged and Decreed that the defendant's motion for summary judgment be, and the same hereby is, granted, that the plaintiffs herein do have and recover nothing by their suit, that the defendant, Elgin, Joliet and Eastern Railway Company, go hence without day, and that the said defendant do have and recover of and from the plaintiffs its costs and charges in this behalf expended and have execution therefor.

Enter:

John P. Barnes,
Judge.

Dated: November 13, 1942.

10 And on, to wit, the 28th day of December, 1942, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Notice of Appeal in words and figures following, to wit:

11 IN THE DISTRICT COURT OF THE UNITED STATES, Filed Dec. 28, 1942.

Northern District of Illinois,

Eastern Division.

G. W. Burley, *et al.*, *Plaintiffs*,
vs.
Elgin, Joliet and Eastern Railway Company, a corporation, *Defendants.*
} Civil Action. No. 2341.

NOTICE OF APPEAL TO THE CIRCUIT COURT OF APPEALS UNDER RULE 73(b).

Notice is Hereby Given that plaintiffs, G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith, and M. H. Young, by John H. Gately, their attorney, hereby appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the order entered on the 13th day of November, A. D. 1942, as follows:

It Is Therefore Ordered that the defendant's motion for summary judgment be, and the same is, hereby granted that the plaintiffs herein do have and recover nothing by their suit; that the defendant, Elgin, Joliet and Eastern Railway Company, go hence without day, and that the said defendant do have and recover of and from the plaintiffs its costs and charges in this behalf expended and have execution therefor.

G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith, and M. H. Young,
By John H. Gately,
John H. Gately,
134 S. La Salle Street,
Franklin 4546.

Filed Dec. 28, 1942.

12 And on, to wit, the 28th day of December, 1942, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Notice of Filing of Notice of Appeal in words and figures following, to wit:

13 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—2341) * *

NOTICE OF FILING OF NOTICE OF APPEAL.

To: Messrs. Knapp, Allen and Cushing,
Attorneys for Defendant,
208 S. La Salle Street,
Chicago, Illinois.

You Are Hereby Notified that the plaintiffs-appellants have this 28th day of December, A. D. 1942, filed their Notice of Appeal in the above-mentioned cause, a copy of which Notice of Appeal is hereto attached and served upon you.

John H. Gately,
134 S. La Salle Street,
Franklin 4546,
Attorney for Plaintiffs-Appellants.

Received a copy of the above Notice of filing of Notice of Appeal, together with copy of Notice of Appeal therein referred to, this 28th day of December, A. D. 1942.

Paul R. Conaghan.

14 And on, to wit, the 28th day of December, 1942, came the Plaintiffs-Appellants by their attorney and filed in the Clerk's office of said Court their certain Statement of Points in words and figures following, to wit:

15 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Dec. 28, 1942.
• • (Caption—2341) • •

STATEMENT OF POINTS.

Plaintiffs-Appellants herewith present the points upon which they claim the Court erred:

1. In denying the Plaintiffs' Motion to Strike the Defendant's Motion to Dismiss the Complaint, said motion to dismiss containing pleas of res judicata and release.
2. In allowing the motion of the defendant for summary judgment.
3. In entering judgment that the plaintiffs take nothing by their complaint.
4. In denying the Plaintiffs' right to trial by jury of the issues of fact set up in the complaint; and the issues of fact improperly raised by the Defendants in their motion and affidavit, that is the plea of release therein contained.

G. W. Burley, et al.,
By John H. Gately,
John H. Gately,
134 S. La Salle St.,
Franklin 4546.

16 And on, to wit, the 13th day of February, 1943, came the Plaintiffs-Appellants by their attorney and filed in the Clerk's office of said Court their certain Designation of Contents of Record on Appeal in words and figures following, to wit: Feb. 13, 1942. Filed

17 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—2341) • •

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

1). Transcript of proceedings heretofore filed in the United States Circuit Court of Appeals, their case No. 7717.
2). Petition for leave to amend Complaint.
3). Order of Court entered on said Petition.

4). Notice of Appeal to the United States Circuit Court of Appeals.
5). Notice of filing Notice of Appeal.
6). Statement of Points.

John H. Gately,
John H. Gately,
Attorney for Plaintiffs.

Received a copy of the Designation of Contents of Record on Appeal, this 13th day of February, A. D. 1943.

Paul R. Conaghan,
Attorney for Defendant.

Northern District of Illinois, } ss.
Eastern Division, }

I, Roy H. Johnson, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete Amended transcript of the proceedings had of record made in accordance with Designations filed in this Court in the cause entitled G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith and M. H. Young *vs.* Elgin, Joliet & Eastern Railway Company, a corporation, No. 2341, as the same appear from the original records and files thereof, now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 21st day of April, A. D. 1943.

(Seal)

Roy H. Johnson,
Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed record, printed under my supervision and filed on the twenty-eighth day of May, 1943, in:

Cause No. 8249

G. W. Burley, *et al.*,
Plaintiffs-Appellants,

vs.

Elgin, Joliet and Eastern Railway Company, a Corp.,
Defendant-Appellee,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 5th day of April, A. D. 1944.

Kenneth J. Carrick
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the sixth day of October, in the year of our Lord one thousand nine hundred and forty-two, and of our independence, the one hundred and sixty-seventh.

G. W. Burley, *et al.*, *Plaintiffs-Appellants,* *vs.* Elgin, Joliet and Eastern Railway Company, a Corporation, *Defendant-Appellee.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.
8249	

And, to-wit: On the twenty-fourth day of February, 1943, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellants, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 8249

G. W. Burley, *et al.*,

vs.

Elgin, Joliet and Eastern Railway Company, a Corporation.

The Clerk will enter my appearance as counsel for appellants.

John H. Gately,
134 S. La Salle St.

Endorsed: Filed February 24, 1943. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the seventeenth day of April, 1943, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 8249

G. W. Burley, *et al.*,
Plaintiffs-Appellants,

vs.

Elgin, Joliet and Eastern Railway Company, a corporation,
Defendant-Appellee.

The Clerk will enter my appearance as counsel for defendant-appellee.

Paul R. Conaghan,
208 South La Salle Street,
Chicago, Ill.

Endorsed: Filed April 17, 1943. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the fifteenth day of October, 1943, the following further proceedings were had and entered of record, tc-wit:

Friday, October 15, 1943.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.

G. W. Burley, *et al.*, *Plaintiffs-Appellants*, *vs.* Elgin, Joliet and Eastern Railway Company, a Corporation, *Defendant-Appellee.* 8249	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Mr. John H. Gately, counsel for appellant, and by Mr. Paul R. Conaghan, counsel for appellee, and the Court takes this matter under advisement.

And afterwards, to-wit: On the tenth day of November, 1943, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 8249. October Term and Session, 1943.

G. W. BURLEY, Et Al., *Plaintiffs-Appellants,*
vs.
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A Corporation, *Defendant-Appellee.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

November 10, 1943.

Before MAJOR, KERNER, and MINTON, *Circuit Judges.*

MINTON, *Circuit Judge.* Prior to July 24, 1934, the plaintiffs-appellants were employed as switching crews in the yards of the Standard Oil Company at Whiting, Indiana. The defendant-appellee took over the operations in the yards, and employed the plaintiffs as switching crews.

The complaint alleges that the plaintiffs were members of the Brotherhood of Railroad Trainmen, and that the defendant and the plaintiffs agreed that as to rates of pay, hours, and working conditions, the parties should be governed by a schedule or agreement then in force between the defendant and its employees, which had been negotiated by the Brotherhood of Railroad Trainmen as a representative of the switching crews of the defendant. It was alleged that Article 6 of the schedule or agreement provided that the switch engines should start from a certain place at a certain time; that this Article 6 was by agreement of the plaintiffs and the defendant suspended for the first thirty days of the employment of the plaintiffs

by the defendant, and that after the expiration of the said thirty-day period and until November 14, 1938, the defendant violated said Article 6; that for the defendant's failure to observe Article 6, it became liable, under the terms of the agreement and in accordance with the established practice among railroads, to pay the plaintiffs as damages for each day's violation an additional day's pay at time and one-half. The sufficiency of this complaint was raised by a motion to dismiss.

We think the complaint states prima facie a cause of action. It is alleged that it is the duty of the defendant to observe Article 6 of the employment schedule or agreement, and that the defendant has violated Article 6, and by reason of such violation, the plaintiffs are entitled to damages; and that the amount of the damages is fixed "in accordance with the established practice among railroads and employees thereof, and as provided in said Article 6 of said agreement as aforesaid." Article 6 is set forth in the complaint and contains no provision for damages in the event of its violation, or the measure thereof. It was contended by the defendant that the custom and usage relied upon to measure the damages was not sufficiently alleged. We think that the allegation of the custom and usage was sufficient to withstand a motion to dismiss. *Lemos* v. *Madden*, 28 Wyo. 1, 200 Pacific 791. Certainly, under the liberal practice of pleading permitted under the Federal Rules of Civil Procedure, this allegation is sufficient.

It was also contended by the defendant that there was no allegation that the defendant knew of this custom and usage. It has been held by us that parties to a contract engaged in the same trade will be presumed to have contracted with reference to, and to have knowledge of, all lawful usages of that trade. *Western Petroleum Co.* v. *Tidal Gasoline Co.*, 284 Fed. 82, 84. The allegation of knowledge on the part of the defendant was not necessary, as the plaintiffs and the defendant were engaged in the same industry, and an allegation showing the fact of such relationship is sufficient.

At the time the defendant filed the motion to dismiss, it set forth in a pleading accompanying the motion the defense that any claims the plaintiffs might have had were compromised and settled by the plaintiffs' agents,

who were the Chairman and the Secretary of the Grievance Committee of the Brotherhood of Railroad Trainmen, the bargaining agents for the plaintiffs. Affidavits and certain documents were attached to this hybrid pleading, and a motion to strike it was filed by the plaintiffs.

Thereafter, the defendant filed a motion for summary judgment. The plaintiffs then filed a reply to this motion, in which it was alleged the said bargaining agents were not authorized to negotiate, compromise, and settle any claims the plaintiffs might have for damages for violation of Article 6, and that their authority was limited "to prosecuting a complaint before the Board to compel the defendant to comply with Article 6." Affidavits, bylaws, and the constitution of the labor organization were exhibited. The defendant filed its reply to the plaintiffs' motion to strike and to the counter-affidavits of the plaintiffs. The District Court granted the defendant's motion for summary judgment.

Was the defendant entitled to summary judgment? We think the motion should not have been granted, because it seems clear to us that this record presents a question of fact as to whether a compromise of the claims relied upon in the plaintiffs' complaint had been compromised by the plaintiffs' agents. This depends upon the authority of the so-called agents of the plaintiffs to negotiate, compromise, and settle plaintiffs' claims for damages for the violation of Article 6. The plaintiffs admit they authorized the bargaining agents to negotiate, which carried with it the right to compromise and settle, the question of what the defendant was going to do about the observance of Article 6. But the plaintiffs deny that they ever gave authority to the bargaining agents to negotiate, compromise, and settle their claim for damages for past violations of Article 6.

The procedure for summary judgment was intended to expedite the settlement of litigation where it affirmatively appears upon the record that in the last analysis there is only a question of law as to whether the party should have judgment in accordance with the motion for summary judgment. If there was any question of fact presented on the record in the proceedings for summary judgment, the motion could not be sustained. *Campana Corporation* v. *Harrison*, 135 F. 2d 334, 336. Because we think this

record affirmatively shows there was an issue of fact, the motion for summary judgment should not have been granted.

The judgment is reversed, and the cause remanded, with instructions to proceed in accordance with this opinion.

Endorsed: Filed November 10, 1943. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the tenth day of November, 1943, the following further proceedings were had and entered of record, to-wit:

Wednesday, November 10, 1943.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.

8249	G. W. Burley, *et al.*, *Plaintiffs-Appellants*, *vs.* Elgin, Joliet and Eastern Railway Company, a Corporation, *Defendant-Appellee.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said District Court with instruction to proceed in accordance with the opinion of this Court filed this day.

And afterwards, to-wit: On the twenty-sixth day of November, 1943, there was filed in the office of the Clerk of this Court, a Petition for Rehearing, which said Petition is in the words and figures following, to-wit: